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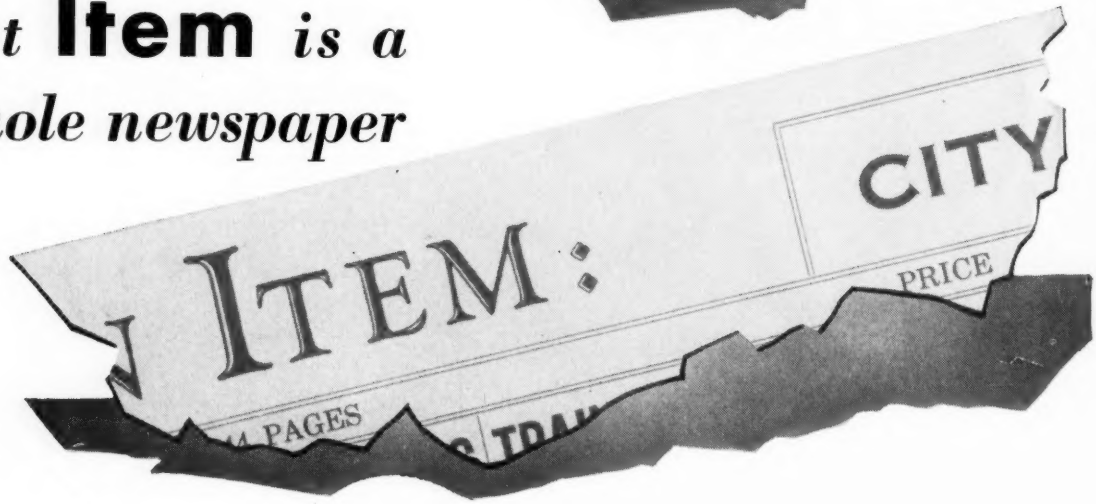
75th Annual Meeting . . . San Francisco . . . September 15-19

item *is a small paragraph*

but **Item** *is a whole newspaper*



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SEPTEMBER, 1952

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1140 North Dearborn Street, Chicago 10, Illinois. Entered as second class matter August 25, 1920, at the Post Office at Chicago, Illinois, under the act of August 24, 1912.
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The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement of a member of the Association in good standing and are considered in each case by a Committee on Admissions of the appropriate state. If the applicant is a member of the Bar of the state or territory in which he resides or has his principal office, or is a member of a federal, state or territorial court of record of a state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of such states or territories. If, however, the applicant is not a member of the Bar of the state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of those states or territories or is referred to the Committee on Admissions for a state or territory in which the applicant formerly resided and to the Bar of which he was admitted. Upon the approval of an application by a majority of the proper Committee on Admissions, an applicant is deemed nominated for membership. All nominations made pursuant to these provisions are reported to the Board of Governors for election. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the following Sections: Bar Activities, Criminal Law, Judicial Administration, Legal Education and Admissions to the Bar, and the Junior Bar Conference. Dues for the Section of Antitrust Law, the Section of Labor Relations Law and the Section of Patent, Trade-Mark and Copyright Law are $5.00 a year; due for the Section of Taxation are $6.00 a year; dues for all other Sections are $3.00 a year.

Blank forms of proposal for membership may be obtained from the Association offices at 1140 North Dearborn Street, Chicago 10, Illinois.

CURRENT OUTLOOK

American
Bar Association
Journal
★
September 1952

• Can municipalities tax lawyers?

If cities have the basic power to license and tax the practice of law as an occupation or otherwise, or if a legislature can delegate such power to a city, the bar associations and their members should be clear that this is, in fact, the case and why.

For example, the Jacksonville Bar Association has recently successfully resisted enactment of an ordinance proposed by their City Council to raise the occupational license tax on their lawyers another ten dollars. Florida has an integrated rather than a voluntary Bar which may or may not affect that situation. Cities needing money have proposed this elsewhere.

Apart from the principle involved in permitting the executive or legislative branches of government, as distinguished from the judicial branch, to regulate or tax the practice of law and performance of their duties by officers of the courts, these occupational license taxes can be high enough to constitute a heavy financial burden. The limits of such a taxing power may be higher than you think. Should a professional man pay more or less than tavern keepers, pawnbrokers or peddlers? How will the lawyers' tax relate to the cost of inspecting and regulating them? Should such inspection extend to their books and files? Should their charges be regulated? What fines and penalties should be provided? What is the remedy for denial or revocation of license, however erroneous?

There may be those who will explore such powers for ulterior purposes. And this may be a fascinating research problem for each vigilant association's constitutional lawyers. Even the Boy Scouts have a motto for it.

• Bar associations are a lawyer's best friends

The Wisconsin Bar appears to lead in a new bar activity. This Association gave practical help to its members by designing and distributing check lists by which the practitioner can quickly conduct a complete initial interview with a client. These devices cover the fields of wills, administration of estates, incorporations, plaintiffs' and defendants' personal injury and divorce cases, real estate sales, closings, statements and outline opinions of title. Included is a pamphlet of suggestions and informational data for executors and other personal representatives.

They are thorough and adapted to local law, so that a lawyer can see at a glance after each interview or letter which portions of his information, evidence and work are completed and which are not.

This has been done before commercially as well as by other associations, but never more completely and helpfully. Lucky Wisconsin lawyers!

• Sudden death and why

Our habituation to the once useful apparatus of a day that is gone blinds us to its obsolescence and ineffectiveness to solve today's problems.

For example, behold the coroner, honored by an ancient elective office. His function is to ascertain the presence or absence of foul play in cases of sudden death. Long ago, any honest man could fulfill that function as well as another, particularly, if the coroner chanced to be a physician.

Today, that whole concept is challenged by our Criminal Law Section of which Arthur J. Freund, of St. Louis, is Chairman. Experience under the Maryland and Virginia Post-Mortem Examiners Law, the state-wide medicolegal investigative system in Massachusetts, in New York City and in the Department of Legal Medicine at Harvard Medical School are offered to prove that medicolegal investigation of the cause of death can only be performed accurately through pooled expert services under specially trained heads.

Only by a model state medicolegal investigative system can the fact of murder and crime be established, can the innocent be exonerated, can court proceedings be supported by incontrovertible evidence. Arkansas has just enacted such legislation. We understand that the Wisconsin, Michigan and Missouri Bars are supporting the principle. The American Medical Association is sending information about it to the state medical societies.

Here is work in the public interest for which a bar association can take due public credit while testing its legislative techniques against an obsolete, indefensible system. A new public relations set-up can be geared to it. What can a Bar lose by it other than its own apathy?

At the instance of the Criminal Law Section, there has been distributed to each officer of every bar association immediately concerned "A Model State Medicolegal Investigative System" in pamphlet form. They are asked to let us know what is done about it. Other copies are obtainable at 50 cents from the National Municipal League, 299 Broadway, New York 7, New York.

• How much do lawyers make in 1929 dollars?

The state and local associations' activities disclose a new flurry of fee schedule studies. This may be occasioned by the Department of Commerce statistics showing a constantly decreasing average per capita income of lawyers over the nation. A simple multiplication of 1929 per *diem* or other charges by the intervening inflation factor explains much of the lawyers' diminished real income. His average charges have not kept pace with the devaluating dollar as recently pointed out by Arch Cantrall at 38 A.B.A.J. 196; March, 1952. The decrease of average income is much worse in some states than in others.

The Minnesota State Bar Association has recently made a most thoughtful study of lawyers' fees, has developed an up-to-date schedule and has coupled that with its excellent public relations program to educate its members and the public to the economic facts. This is hard but appreciated work. Minnesota lawyers owe their Association and its working members a debt of gratitude and something more.

The Illinois State Bar Association has been doing this work each year since 1934, to good effect, but now they are outdone. However, they appear to have gone farthest in surmounting antitrust objections to such studies and resulting fee schedules.

• Are your dues in line?

A tabulation of the dues currently charged by all the state and many of the local bar associations has been compiled by John E. Berry, Executive Assistant of the New York State Bar Association, in his capacity as Secretary of the Conference of Bar Association Secretaries. Copies of this have been sent to all members of the Conference, along with a directory of officials of the various large bar associations and organizations, which also appears in the American Bar Association Directory. The latter is reprinted beginning at page 1A of *Martindale-Hubbell Law Directory*, Volume II.

Comparison of the programs planned and carried out in each of the associations with the dues charged by those associations will reveal a striking relationship between activity and dues leading to the general conclusion that the work of an association, in extent and effectiveness, is directly proportionate to its available funds. A stream can rise no higher than its source and heroic efforts to do a lot of work with a little money do not appear to change the result greatly, because hard work by the members is the first half, and adequate money is the other half of an association's success.

Edward B. Love
Director of Activities
Editor-in-Charge

The Youth Court of Baltimore:

New Bricks with Old Straw

by Emory H. Niles • Judge of the Supreme Bench of Baltimore City (Maryland)

■ Two years ago, the judges of the Baltimore courts, acting upon their own, using powers they already had, set up a new type of court, designed to dispose of all criminal cases in which any of the defendants was between the ages of 16 and 21. The Youth Court thus stands between the Juvenile Court and the Criminal Court as an agency to give special treatment to the defendants who are brought before it. This article, by the first judge to serve a full year on this experimental court, describes what has been done without the necessity of new statutes.

■ There are forty-one states which have not adopted the Youth Correction Authority Act, but those of us who live in them need not regard the matter of improving our practices with respect to young offenders as requiring a constitutional amendment, a statute, or even a change in the criminal rules. Even in those states which have established a Youth Correction Authority, I venture to guess that the millennium has not arrived. The statute may be on the books; but where are the classification centers, the diagnostic clinics, the psychiatrists, the psychologists, the instructors, the probation and parole officers? Above all, where is the intelligent, understanding public opinion to make the system work? Not all *in esse*, I suggest, and much *in futuro*.

Much can be done in our states piecemeal. Most states have statutory systems which have been modernized in part, in which judges are given wide discretion as to sentence and as to granting probation. In many states, able probation, parole and psychiatric services already exist.

Maryland is particularly fortunate in its statutes. There is no minimum punishment, except for murder in the first degree. Sentences for offenders under 25 are indeterminate. The correctional institutions are intelligently and well run. The parole and probation departments, while not perfect, are competent and know their business.

The judges in the Baltimore courts felt, therefore, about two years ago, that the time was ripe for an experiment in establishing and operating a Youth Court by means of the powers which they had already. The only decision needed was the agreement of the judges to try it. The only funds required were for the appointment of two additional probation officers. The vital ingredients were furnished by the co-operation, and will to get results, from the judges, the State's Attorney, the Prison Authorities, and the Probation Department. The only formal and essential step required was to assign all cases involving youths to a single judge for trial.

Surveys of the probable case load, and organizational plans, occupied about a year, and indicated that "youth cases" would constitute about one-third of the total cases in the Criminal Court. On October 1, 1950, the Youth Court was started under former Judge Joseph Sherbow. On January 1, 1951, I took over for the first full year, and the present paper is based upon the experience of that year, in the light of a number of other years spent in the Criminal Court under the Baltimore rotation system.

The Youth Court of Baltimore is thus simply a division of the adult Criminal Court; it disposes of all cases in which any of the defendants are between their sixteenth and twenty-first birthdays. In 1951 it disposed of 934 cases, almost all of which were, under the Maryland system, tried without a jury by the election of the defendant. Its object is to give special treatment to youths who are too old for the Juvenile Court, and yet not old enough to be considered as true adults, to be tried in the ordinary Criminal Court.

In spirit, it stands between the Juvenile Court, which is technically a civil court, and the Criminal Court, which administers the traditional criminal law in cases of adults. Its objectives and methods are roughly parallel to those of the Youth Correction Authority sponsored by the American Law Institute, and now adopted in Massachusetts, Wisconsin, Minnesota, Texas, California, Washington, Arizona, and throughout the

federal court system. Certain basic principles on which it operates are:

1. The safety and protection of society is the basic objective.
2. The protection desired is for the "long pull"; *i. e.*, the whole life of the defendant, not merely the "short term" constituting his sentence.
3. Each defendant should be dealt with as an individual, and the punishment should fit the criminal rather than the crime.
4. Youths between 16 and 21, on the average, are more susceptible to influence, either good or bad, and offer more chance for rehabilitation, than older persons, particularly old offenders or repeaters.
5. Incarceration is not the only proper form of treatment. Probation, parole, fines, supervision, work discipline, medical and psychiatric treatment are all useful tools which may be used in appropriate cases to attain the basic objective.
6. The rehabilitation of a defendant, if it can be accomplished, is of more protection to society than his punishment.

It is regrettable that the average citizen has not given close attention to the bases upon which the criminal law operates. The subject is full of controversial points, but it may be of value to set forth as simply as possible my own ideas in order to clarify the observations which follow.

Over-all Purpose of Criminal Law Is Security of Society

Members of this Association are familiar with the three classical theories of punishment, *viz.*, vengeance, deterrence and rehabilitation. My own view is that since the security of society is the over-all objective, and since the criminal law should be used to attain that security, it is immaterial whether the security itself is attained through vengeance, through deterrence or through rehabilitation. But each of the last two theories has some validity, and therefore in imposing sentences in criminal cases, I find a certain overlapping in the reasons which move me to the decision regarding sentence in a particular case.

There are, in general, three different types of offenders, which constitute the regular grist of the Criminal Court.

In the first place, there is the hardened repeater. Safety of society can be attained only by imprisoning such men in institutions of maximum security.

The second class of cases is the exact opposite of the first, namely, first offenders of youthful age who have committed crimes of only moderate gravity. It is obvious that, if through treatment extending over one to five years, a young man can be fitted for a useful life extending over a period of from 20 to 40 years, the safety of society has been increased.

The third class of cases lies between the two. It consists of cases where the age and record of the defendant, the family background and environment, the nature of the offense, and all the other circumstances are so mixed as to make it difficult to reach a clear conclusion as to the probabilities for the future. This is the doubtful class, and it is here that the real difficulties are presented.

In many cases persons who may be reclaimable have nevertheless committed crimes of great gravity which really go to the root of and threaten the social order. The typical crime of this character is armed robbery. In such a case it has seemed to me that the element of deterrence occupies the preponderating role and, therefore, I have felt that a heavy sentence was necessary, in the hope that the deterrent effect would be so substantial as to be worth the loss involved in the single life affected, and perhaps ruined, by the sentence.

The greatest degree of ignorance, however, exists in connection with deterrence. It is absolutely impossible to determine in any given case, in a series of cases, or in a policy relating to different kinds of cases, how much deterrence is in fact accomplished by severity or lack of severity, or for how long the deterrence lasts.

Since moral views vary greatly as between different segments of our society, it seems to me that differences in moral views between individuals must take a secondary place. It may well be that the taking of vengeance is a commendable act, morally, and that letting an offender go scot free is immoral. I think, however, that almost every lawyer would subscribe to the proposition that if through some scientific research an antibiotic should be developed—it might be called "sulfacriminol"—which would eradicate criminal tendencies, the only sensible course to pursue would be to give every prisoner a dose of "sulfacriminol", and then close the prisons. Any view that such a course would be immoral as allowing the guilty to go free would be regarded as trivial, in view of the vast benefits by way of safety which society would achieve.

Certain classes of prisoners seem to be benefited by certain types of prison. Certain other classes of prisoners do not seem to be so benefited. It is also true that the number of persons who would reform in any event, whether they go to prison or not, is unknown; and the number of persons who would commit other crimes, whether placed on probation or not, is unknown. Only the dimmest outlines of results are discernible, and they follow in general the lines of common sense which could be predicted without either academic research or psychological jargon. They are simply these: first, that the younger the man is, the more susceptible he is to influence, either good or bad; second, that the background, and particularly the family background, of each man is of immense and usually preponderating importance.

Forecasts of future conduct are highly conjectural, but if the forecast is correct, the gain to be realized is immense, at least percentage-wise. Assume a boy of 18 for whom the appropriate penalty would be two years in the reformatory, if he is incarcerated. Assume also that such two years would not result in rehabilitation, but would corrupt the boy, and make him a dangerous citizen for the ensuing twenty years. If the boy is sent to prison and corrupted, the balance sheet would be:

Profit

2 years of safety from further crimes

Deterrence of others (amount undetermined)

Loss

2 years lost life of defendant
Monetary cost of imprisonment for two years, say $6,000
Bad conduct for 20 years

There is thus something like ten times as much loss as gain.

On the other hand, if the assumption is that probation will be effective to reform the man in question, the balance sheet will be as follows:

Loss

Danger of further crimes during 2 years of probation
No deterrence of others

Profit

20 years of useful life
Saving of cost of imprisonment for 2 years, say $6,000

The balance sheet is thus reversed, with ten times as much gain as loss.

Decision as to Imprisonment Involves a Calculated Risk

Such a risk has many of the aspects of a business risk, and, as in business, in many cases the risk seems to be worth taking. Experience shows, I think, that the decisions actually made are more often right than wrong. Nevertheless, in every case the amount of deterrence is unknown. In every case the critical and overwhelmingly important factor is the prognosis; *i. e.*, the answers to the questions whether prison will cure or corrupt, and whether probation will cure and be safe. The answers are necessarily based on conjectural and unprovable premises. Decisions are not mere guesses; they are based on data; but, whether for or against imprisonment, they are calculated risks.

In the Youth Court of Baltimore careful statistics have been kept with respect to nature of offense, race, age and disposition. They indicate:

a. Cases of white youths were 54 per cent of the total; cases of colored youths were 46 per cent of the total. The colored population of Baltimore is approximately 20 per cent of the whole.

b. The crime rate among defendants 16 years old and under is about twice as high as the rate among defendants of 20. There is a continuous drop in number of cases as age increases.

c. Defendants were represented by counsel in 90 per cent of the cases.

d. Probation without a verdict was granted in 9 per cent of the cases.

e. Probation was granted under a verdict of guilty and a suspended sentence in 41 per cent of the cases.

f. Total probations granted, with and without verdict, amounted to 48 per cent.

g. Presentence investigations were made in 82 per cent of the cases in which sentence was suspended.

Presentence investigations by the Probation Department have been made in the great majority of cases in the Youth Court, except in those cases in which the nature of the offense has made incarceration inevitable. In some cases of murder, manslaughter, robbery with a deadly weapon, and in some cases of assault with a deadly weapon, no investigation was made, when sufficient facts were brought out at the trial for a decision to be reached. Not only are offenders guilty of such crimes probably bad risks for probation, but in connection with such offenses the element of deterrence would seem to make incarceration advisable.

One of the original objectives in the organization of the Youth Court was to prevent, insofar as possible, the contamination of youthful offenders in jail while awaiting trial. The judge can remand a defendant to the custody of his parents with or without the recommendation of the State's Attorney or the Probation Department, but it has been done in only a small proportion of cases. After either arraignment or trial I have in some cases remanded the defendant to his family when it appeared that probation would probably be granted. There is always a difficult balance to strike between protecting a presumably uncontaminated youth from the evil influences of the jail and "giving him a taste of it" in order to improve him.

Baltimore is one of the few jurisdictions in which the judge is empowered to place a defendant on probation *without* a verdict. Probation without a verdict is one of the most useful instruments of the Youth Court. Its great virtue is that it puts the offender under supervision, and in cases where fines, restitution, and costs are ordered, results in his actually feeling the weight of the court's sentence without destroying his reputation or character for the future. So far, probation without a verdict has not been used as much as I hope it will be.

My general view of the matter is that there is no advantage to the state in having a large number of people marked with the brand "criminal" if the same or better results can be obtained without such a stigma. For practical purposes, probation under a suspended sentence after a verdict of guilty requires exactly the same conduct during the probation period as a probation without a verdict. If this is so, there is no advantage in finding the verdict. If probation is violated, the only disadvantage is that the case must be tried *de novo*. Usually violations of probation consist of new offenses in any event, and there is no necessity of trying the earlier case at all; sentence is simply imposed in the later case. I have usually made the sentence for the later offense run concurrently

Emory H. Niles has been a judge of the Supreme Bench of Baltimore City since 1938. A native of Baltimore, he studied at Johns Hopkins and the University of Maryland and was a Rhodes scholar. He began the practice of law in Baltimore in 1919 after returning as Captain, Field Artillery, from World War I. He has been a lecturer in law at the University of Maryland since 1925.

with the sentence for the previous offense.

Problem Needs More Thought and Study

The whole problem of marking a boy for life with a "criminal record" needs further thought and study. The idea of giving a probationer the right, if he completes his probation successfully, to wipe out the criminal stain has much merit. By such a device he is enabled and given an incentive by his own efforts to clear his record completely. The officers of the Probation Department are now engaged in an inquiry as to similar procedures and the results obtained in other jurisdictions.

In determining the sentence to be imposed in each case, I have endeavored, insofar as possible, to consult both the Assistant State's Attorney and the Probation Officers. This practice is based on several considerations, including the following:

a. It promotes uniformity as between offenders, and as between offenses.

b. It obtains the joint views of the various arms of the court in fixing what is extremely difficult to determine, namely, the amount of incarceration either for a given offense or for a given offender.

c. It tends to break down the sharp division between the attitudes of the prosecutor, whose tradition is severity, the Probation Department, whose tradition is leniency, and the judge whose tradition is that he should be guided by his individual beliefs.

In the Youth Court by far the largest categories of offenses, and those categories in which the facts bear most resemblance to each other, are larceny of automobiles by white boys; larceny of property from an automobile, and store burglary, by Negro boys. As a base point from which to start, I have in these cases tended to impose a sentence of "not exceeding one year" in the Reformatory for Males. In the case of first offenders without previous records or with minor records, the sentence has usually been suspended and the defendant placed on probation. While the facts in some of the cases would justify heavier sentences, I have felt that for the first offense in the Youth Court, whether it is to be served or not served, one year is a reasonable time. There is the further consideration that all sentences to the Reformatory are under present law indeterminate, and the defendant has an opportunity by good conduct to get out before the expiration of the nominal term.

A considerable number of fines have been imposed by me in cases of unauthorized use of automobiles, and in some cases of assault. The use of fines in automobile cases is essentially an experiment, no one having heretofore, so far as I know, tried them out systematically. The underlying idea is that in the case of the average joy-riding, unauthorized-use case where there is no felonious intent, incarceration is too severe, and a mere warning with probation is too lenient. The object of the fine is to sting and discipline, but not injure. I have developed a pattern of imposing $100.00 plus costs, plus counsel fee, if any, on the offender, and of requiring him to pay in installments, which, if punctually lived up to, can be paid out in from six to nine months. In cases where boys are so young that their earnings are very low, and where a wife, children, or dependent parents will really bear the brunt of the payments, I have reduced the sums imposed; in cases where irresponsible young men are making good wages and apparently dissipating them in useless expenditures, I have increased them. In one case of probation without a verdict, the probationer was ordered to pay $800.00 in restitution for damages to an automobile. He paid the full amount in installments of $15.00 per week, and is now, since there is no record of conviction against him, eligible to enter the Navy.

A tabulation made at the end of the year showed that about 61 per cent of the defendants had paid or were paying regularly; about 23 per cent were paying irregularly; and in about 16 per cent the defendants had paid little or had become involved in other difficulties.

The suggestion has been made, and is now being tried out, that in cases where fines are appropriate, some form of compulsory saving be required of the defendant. The probation officers have found that where an offender pays a fine, a lack of sympathy between the probationer and the probation officer is apt to develop, for the reason that the probation officer appears to be merely a bill collector. On the other hand, experience in other cities, and in past years in Baltimore, has indicated that where the defendant is required to save for his own benefit and is then allowed, under the guidance of the Probation Officer, to use his savings for worthwhile purposes, the relationship between the probationer and the Probation Officer is improved, and the education of the probationer himself in economic matters is enlarged. The accumulation of such a fund tends toward the economic security of the probationer, as well as to promote his understanding of the discipline and reasons for his supervision by the Court's officer.

Too little time has passed for anything final to be known about the results of the operation of our Youth Court. Current figures on recidivism, on violations of probation, and on successful completion of probation are encouraging. I hope that other judges in other states may, under their own powers, and without waiting for the millennium, try similar experiments.

Stop Being Terrified of Treaties:

Stop Being Scared of the Constitution

by Zechariah Chafee, Jr. • Langdell Professor of Law, Harvard University

■ The *Journal* takes pleasure in presenting in this issue the conflicting views of opponents and proponents of the constitutional amendment recommended by the American Bar Association to the Congress for consideration. Zechariah Chafee, Jr., of the Harvard Law School, in his article "Stop Being Terrified of Treaties: Stop Being Scared of the Constitution",[1] beginning on this page, thinks that the evils feared by the proponents are remote, and that we ought "to trust our President and our Senators to act carefully and wisely, under the guidance of public opinion, in enabling our nation to play its part in this troubled world".

On the other hand, Eberhard P. Deutsch, who, as a member of the Association's Committee on Peace and Law Through United Nations, helped draft the text of the American Bar Association's proposed amendment, in his article "The Need for a Treaty Amendment: A Restatement and a Reply", beginning on page 735, first points out that "in what is otherwise a government of limited and delegated powers under the Constitution, no express limitation exists on the treaty power". Then he states the reasons in support of the amendment and undertakes to answer the opposing arguments from all sources.

A hearing of the subcommittee of the Senate Judiciary Committee on amendment of the Constitution with respect to the treaty-power and executive agreements was held in May and June of this year and the subject may become a vital issue in the next Congress, when the Judiciary Committee reports. Hence, the attention of all readers is invited to the enlightening discussions in this issue.

■ The outstanding fact for lawyers to have in mind, while considering the constitutional amendment submitted to Congress by the House of Delegates,[2] is that it will cripple scores of treaties which have nothing to do with the United Nations or abstract human rights, or with the relationship between our own Government and American citizens. The main reason given for changing the Constitution is to protect the nation against undesirable treaties of these types. But this American Bar Association draft, if adopted, would weaken the effectiveness of treaties on commerce, civil aviation, the ownership and inheritance of land abroad, carrying on business and professions abroad, freedom from discrimination in foreign taxes, protection of the pecuniary rights and personal safety of Americans in foreign courts, and many other familiar subjects of international agreements.

Amending the United States Constitution is a very serious matter, which demands from American lawyers care and calmness. It ought not to be done in panic or pique. If the domestic powers of the Federal Government are getting improperly extended and abused, then let us lessen them by whatever method seems best, but that is no proof that the treaty powers have been abused. The supporters of the American Bar Association draft have not pointed to a single treaty that was ever ratified and said, "This is so bad that we need a constitutional amendment to prevent it." They just worry about possible U. N. treaties. They give us fears, not facts. A constitutional amendment will last a long time. Resentment at the foreign policies of Mr. Truman and Mr. Acheson is not a reason for a change in the Constitution which will come too late to restrict them but will restrict future Presidents and Secretaries of State,

1. A fuller statement of the writer's reasons for keeping the Constitution unchanged was lately published in 12 *La. L. Rev.* 345 (1952) under the title, "Amending the Constitution to Cripple Treaties". The treaty clauses are also upheld against recent proposals for amendment by Arthur E. Sutherland, Jr., "Restricting the Treaty Power", 65 *Harv. L. Rev.* 1305 (1952); Manley O. Hudson, "Some Problems under Discussion," address to appear in *Proc. Am. Soc. Internatl. Law;* Report of The Association of the Bar of the City of New York Committees on Federal Legislation and on International Law, on "Joint Resolution Proposing an Amendment to the Constitution . . . Relative to the Making of Treaties . . . S.J. Res. 130" (May, 1952).

2. The text of the A.B.A. draft is quoted below. The discussion in the House of Delegates is summarized in 38 *A.B.A.J.* 435; May, 1952. The draft is supported by Report of American Bar Association Standing Committee on Peace and Law Through United Nations, February 1, 1952 (3d Printing, May 1, 1952) at 4-19, 29-33; George A. Finch, "The Treaty-Clause Amendment: The Case for the Association," 38 *A.B.A.J.* 467, June, 1952. For earlier articles on the same side, see Report, *supra*, at 6.

whose policies may be very different. At a time when our country is taking on graver responsibilities in foreign affairs than ever before, we ought not to behave like the man who worried so much over the possibility that he might hit himself in the face that he insisted on having both his hands tied behind his back.

The amendment is considered by the Association's Section of International and Comparative Law to be unnecessary and undesirable.[3]

Lawyers are urged to concentrate their attention on the second sentence of the American Bar Association draft, which changes the whole machinery for enforcing treaties.

> A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect. *A treaty shall become effective as internal law in the United States only through legislation by Congress which it could enact under its delegated powers in the absence of such a treaty.*

The first sentence has been a great talking-point for the amendment, with alarming statements about how treaties can now nullify the Bill of Rights. But its practical consequences will be very small. It will add virtually nothing to the Constitution if several distinguished Supreme Court Justices are right in saying that any treaty provision is now invalid which infringes a constitutional prohibition.[4] Even if they are mistaken, the danger of such treaties getting ratified by the Senate is negligible. Scores of Acts of Congress have been attacked in the Supreme Court as prohibited by the Constitution, and hundreds of state statutes, but not a single treaty in over 160 years.[5] If there be any danger that a treaty conflicting with the Bill of Rights is constitutional, it will happen very rarely. At most, this may be an argument for the first sentence of the American Bar Association amendment. It is not an argument for the second sentence. In order to get rid of a very few objectionable treaties, we do not need to alter our entire procedure for hundreds of unobjectionable treaties.

My remaining discussion will oppose the second sentence of the American Bar Association draft,[6] and urge the great desirability of our present treaty-enforcing machinery in the Constitution just as it stands. "Hold fast to that which is good."

When the Philadelphia Convention wrote the treaty clauses, it kept in mind three indisputable propositions about treaties:

First, treaties are a normal and important instrument of our international relations. Our whole history since 1789 proves this. During the first half century, 60 treaties went into effect; 215 in the second; 524 in the third; and 80 more since 1939. This makes 879 in all, averaging over 5 treaties every year.[7] The supporters of the amendment argue that there are other ways besides treaties for conducting our international relations,[8] but this is not an impressive reason for crippling the most usual method. Our choice of methods ought to remain as conveniently wide as it is now.

Second, treaties are bargains. In order to gain, we have to give. Often we get desirable privileges in another country by granting similar privileges in the United States to its citizens. We do not want to force unequal treaties down foreigners' throats like the Nazis and the Russians. Our faithful observance of treaties helps Americans abroad. For example, it may be very valuable for American corporations to do business in another country; corporate officials will wish to reside there and be secure in their persons and property. The usual way to assure this is by granting reciprocal privileges in the United States. Again, American tourists are glad to find an American physician or dentist in a European city. This may involve a corresponding permission for qualified doctors and dentists from that country to practice here, without obstacles from state laws because of being aliens.

Third, treaties need to be performed after they are made. Justice Curtis said, "The foreign sovereign between whom and the United States a treaty has been made has a right to expect and require its stipulations to be kept with scrupulous good faith . . ."[9] The internal methods by which this performance is obtained may be no concern of the foreigners, but it is very important to us that they operate smoothly and effectively. Any gap between promise and performance is bad. It creates international claims for breach of faith, embarrasses future negotiations, and may interfere with the well-being of American citizens abroad.

Writers of the Constitution Avoided Two Dangers

The statesmen at Philadelphia took great pains to avoid two different dangers connected with treaties. They guarded against unwise treaties by requiring a two-thirds vote by Senators, who would have much at heart the interests of their respective states. They guarded against infractions of treaties on the part of states or individuals by the supremacy clause, under which most treaties, when ratified by the Senate and proclaimed by the President, are law in the United States as fully as an Act of Congress.

Apart from a very few exceptions like the Migratory Bird Treaty of

3. See the remarks of the Chairman of the Section, Lyman M. Tondel, Jr., of New York in opposition to the American Bar Association draft. 38 A.B.A.J. 435, May, 1952.

4. Field, J., *Geofroy* v. *Riggs,* 133 U.S. 258, 267 (1890); Holmes, J., *Missouri* v. *Holland,* 252 U.S. 416, 433 (1920); Van Devanter, J., *United States* v. *Minnesota,* 270 U.S. 181, 207 (1926); Hughes, address, [1929] *Proc. Soc. Internatl. Law* 195-196; Hughes, C. J., *Burnet* v. *Brooks,* 288 U.S. 378, 400 (1933). The same position is taken by Chafee, "Federal and State Powers under the UN Covenant on Human Rights", [1951] *Wis. L. Rev.* 389 at 433-453.

5. Some lawyers may consider *Missouri* v. *Holland,* 252 U.S. 416 (1920), to be a solitary exception to my statement; but the attack was on the statute, not on the treaty, and no violation of a constitutional prohibition was charged. The statute was expressly held to comply with the Tenth Amendment, because the distribution of federal and state powers in foreign affairs differs from that in domestic matters.

6. Most of my objections also apply to the slightly different provisions in section 3 of Senator Bricker's draft amendment (S.J. Res. 130), reprinted in Report, *supra* note 2, at 27-28.

7. These figures are taken from Sutherland, *op. cit. supra* note 1, 65 *Harv. L. Rev.* at 1327-28.

8. Report, *supra* note 2, at 16-17; Finch, 38 A.B.A.J. 470, 527-29.

9. *Taylor* v. *Morton,* 2 Curtis C.C. 454 (1858), *affd.* without discussion of this point in 2 Black 481.

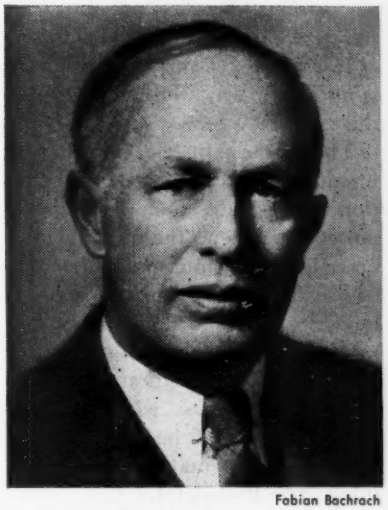
1916 [10] and the United Nations Charter,[11] whose nature requires them to be implemented by legislation, it is very desirable for American treaties to be self-executing. This automatically prevents any gap between promise and performance, which I just showed to be bad. It greatly promotes the convenience of Congress, by saving it the trouble of drafting and passing a statute to carry out all the numerous and complex provisions of many treaties. The treaty becomes effective in our courts without bother or delay. If any inconsistent state laws are in existence, they cause no international complications. It is not necessary to get them overridden by an act of Congress. They are simply declared void by a court when any litigation takes place.

This is the machinery for enforcing treaties which was established with great care by some of the ablest delegates at Philadelphia. They were sensitive to improper encroachments on the states, for besides personal loyalties they knew ratification by state conventions would be very hard to obtain. Yet every critical vote for the supremacy clause was either against a minority of one or unanimous. The treaty clauses were illuminatingly upheld by Madison, Jay and Hamilton in the *Federalist*. They were copied almost verbatim by the Constitution of the Confederacy. Every leading writer on constitutional law, with the solitary exception of Henry St. George Tucker, has heartily approved of them. The State Department, the delegates at treaty conferences, and Senators have long known how to adapt themselves to this process. The supremacy clause has operated smoothly and successfully for over 160 years.

Now it is proposed to junk this long experience and adopt an entirely different process. The American Bar Association draft would throw a great many treaties into the House of Representatives. Proposals to that effect were voted down at Philadelphia 8 to 1 and 10 to 1 because of the difficulties of getting speed and secrecy in the House and of obliging negotiators to consider the reactions of the House as well as the Senate. A bad gap would be created between promise and performance. Treaties could not be enforced in the courts without the novel obstacle of getting an act through Congress, which might take years. Meanwhile, the states would be supreme in foreign affairs and not the nation. Private citizens will be able to violate the treaty with impunity, state legislatures can pass statutes ignoring its terms, state judges must brush the treaty aside as no concern of theirs, and the nation to which we gave our solemn promises can denounce us as contract-breakers and deny our citizens any of the treaty benefits in its own territory. The next time we have some important question to settle with that nation, we are not likely to get very far.

The treaty-enforcing machinery will be further crippled by the final words of the American Bar Association draft. Congress will not be able to pass the indispensable implementing statute unless it could enact the law anyway as domestic legislation. This clause deprives the nation of much of its power to perform its promises in many matters which have customarily been covered by treaties, like doing business by individuals or corporations in intrastate commerce, access of foreigners to state courts when the jurisdictional amount is too low for federal proceedings, etc. —the very matters in which local disobedience to a treaty is most likely to occur. Intricate questions of constitutional law will arise, which nobody has to bother with now. The only way to obtain compliance with many treaties, if this proposal should prevail, would be for the national government to persuade every one of the forty-eight states to shape its laws voluntarily so as to carry out the treaty. That is a burdensome and well-nigh hopeless task.

Canada is in pretty much this situation since it cut loose from the British Parliament. A Privy Council decision held that the treaty-making powers of the Dominion are as narrow as its domestic powers. This is no argument for the American Bar Association draft, as its supporters assert.[12] Canadian lawyers consider their situation extremely unfortunate. They speak of "the judicial labyrinth through which Canadian diplomats must be able to see their ways if effective treaties are to be made."[13] The Privy Council decision is "suicidal in point of governmental efficiency";[14] "destruction of the Dominion's control over . . . foreign affairs";[15] "leaves this country . . . helpless . . . to deal with the problems . . . created by a changing economic system."[16] One Canadian law-



Fabian Bachrach

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10. See *Missouri* v. *Holland*, *supra* note 5.

11. The Charter has been held by the highest state court in California not to be self-executing. See *Fujii* v. *California*, 38 Adv. Cal. Rep. 817 (1952). This knocks out the lower court decision, on which supporters of the American Bar Association draft have relied.

12. Report, *supra* note 2, at 15; Finch, 38 *A.B.A.J.* 469. The argument that many other countries do not have self-executing treaties is answered in the writer's *Louisiana Law Review* article, *supra* note 1 at pages 376-379.

13. V. C. MacDonald, "The Canadian Constitution Seventy Years After", 15 *Canadian Bar Rev.* 401, 418 (1937).

14. *Id.* 419.

15. N. A. M. MacKenzie, "Canada and the Treaty-making Power", *id.* 436, 454.

16. F. R. Scott, "The Consequences of the Privy Council Decision", *id.* 485, 491.

yer wishes Canada had the same treaty powers as the United States.[17]

Just because Canada is in a mess is no reason why we should get into the same mess.

The framers of the Constitution intended the treaty powers of the nation to be wider than its domestic powers, as wide as the unpredictable necessities of international intercourse. The vital distinction between foreign affairs and domestic matters was ingrained in their minds by the Articles of Confederation. In foreign affairs, by contrast with domestic, the Articles made the states nothing and the Continental Congress everything. The Philadelphia Convention continued this exclusive national power to make treaties, but transferred it from the whole of Congress to the President and Senate, besides putting teeth into it by means of the supremacy clause.

The reason is plain why the Constitution enabled the nation to do things in foreign affairs by treaty which Congress could not do by domestic legislation. In home matters the framers rightly expected most of the governing would continue to be done by the states. Congress was given specified legislative tasks of national importance and state legislatures were to take care of the rest. Except for a few outrageous things nobody could do, like enacting bills of attainder or violating the first eight amendments, everything in domestic matters belongs either to Congress or to the states. Thus *somebody* can do whatever law-making needs to be done in a civilized country—there is no vacuum. But in foreign affairs there are no comparable two areas of national matters and local matters. Everything legitimately possible in foreign affairs is of national importance. Here a vacuum would exist if the federal treaty power were narrowly limited (as by the American Bar Association draft). The states cannot take over. They are forbidden to conduct negotiations with other nations. Consequently, unless the national government can act, nobody can act. The framers knew that they were founding a great nation, and they wanted it to be able to behave like a great nation.

One final word. The present treaty-enforcing machinery provides ample remedies against the risks from treaties. There is a risk that a treaty may encroach unduly upon the states, but the Philadelphia Convention said they could object through their Senators. They do not need to object again in the House. The risk that the other nation, not having self-executing treaties, may fail to enact an implementing statute[18] can be met by the President's refusing to proclaim the treaty until the statute is passed or else by repudiating the treaty if the delay is long. The risk that a bad treaty will somehow slip by the Senate can be cured by a later act of Congress terminating the treaty as law of the land.[19] This gap between promise and performance is reserved for a few objectionable treaties whereas the American Bar Association draft creates a gap for all treaties, bad and good alike.

Every constitutional amendment since the first ten cured some evil which had actually happened. Nothing bad has happened about treaties. The main argument for the American Bar Association amendment is only that a dangerous treaty *might* be made and ratified. There is nothing new about that. The Philadelphia Convention worried a great deal about the possibility of dangerous treaties, and then they went confidently ahead. They feared unwise concessions of territory to powerful neighbors and the loss of Mississippi navigation. We fear unwise promotion of human rights inside our country. It is simply a case of different dangers, but not greater dangers.

We face new dangers in foreign affairs and we also face new needs. Like the men of 1787 we ought to face both dangers and needs bravely. Instead of presuming to decide today what must not be done in the future under unforeseeable conditions, we ought, as they did, to trust our President and our Senators to act carefully and wisely, under the guidance of public opinion, in enabling our nation to play its part in a troubled world.

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17. MacKenzie, *op. cit. supra* note 15, at 453. See also F. C. Cronkite, "The Social Legislation References", *id.* 478.

18. Report cited note 2 at 15; Finch, 38 A.B.A.J. 470. Total failure by the other nation to implement the treaty is apparently infrequent since no instance is cited. In the *Factor* case, cited by Mr. Finch, 290 U.S. 276 (1933), Great Britain did enact implementing legislation which interpreted the treaty differently from ourselves. Professor Hudson, also cited, is opposed to the American Bar Association amendment, *supra* note 2, and favors a remedy resembling what I suggest in the text. 28 *Am. J. International Law* 276, note 19 (1934).

19. The validity of this infrequently needed remedy is upheld by the Chinese Exclusion Case, 130 U.S. 581 (1889), and by other Supreme Court decisions.

The Need for a Treaty Amendment:

A Restatement and a Reply

by **Eberhard P. Deutsch** • of the Louisiana Bar (New Orleans)

■ Henry St. George Tucker, a distinguished legal scholar, for some years an outstanding member of Congress from Virginia, and a former President of the American Bar Association,[1] in his great book *Limitations on the Treaty-Making Power,* published in 1915, characterized the treaty clause of the Constitution (Article VI) as a "Trojan Horse", ready to unload its hidden soldiery into our midst, destroying state laws and constitutions and leaving behind the wreckage of the dream of the founding fathers which envisioned maintenance of the established constitutional balance between state and federal power, and preservation of the Bill of Rights intact.

Why do we need a constitutional amendment to regulate the treaty-power? Why does the treaty-making power under the constitutional provisions which have not been changed since 1789, now give rise to such a powerful movement to amend those provisions? There are three reasons:

(1) In what is otherwise a government of limited and delegated powers under the Constitution, no express limitation exists on the treaty-power, and the existence of any implied limitations is shrouded in doubt.

(2) A basic change of viewpoint is being carried into effect with respect to the functions and purpose of treaties. A veritable avalanche of new treaties is being sponsored by the United Nations and its affiliated organizations in the social, economic, cultural, and civil and political fields. It is reliably reported that they have 200 treaties "in the works".

(3) Persistent efforts have been made during the past two decades to find additional constitutional basis for expansion of the powers of the Federal Government, and the treaty-power has been seized upon as a conveniently available vehicle for such expansion.

While acts of Congress are valid only when made "in pursuance of" the Constitution, treaties are the supreme law of the land if they are made "under the authority of the United States". Under a treaty, Congress, by virtue of Article I, Section 8, can pass all laws necessary and proper to give effect to, and implement treaties, even though, in the absence of such treaty, Congress would not have power under the Constitution to pass such legislation; neither by reservation nor understanding can this power of Congress be controlled if Congress chooses to exercise it.[2]

The authority of Congress under the treaty clause was expounded in the leading case of *Missouri* v. *Holland,* 252 U. S. 416 (1920), in which it was held that Congress has power under a treaty to enact legislation which would be unconstitutional in the absence of a treaty. Professor Lauterpacht, of Cambridge University, England, a recognized contemporary authority on international law, has characterized the decision in *Missouri* v. *Holland* as a construction "dangerously approaching that of a constitutional amendment".[3] The trend toward an unlimited treaty-power was further developed in *United States* v. *Curtiss-Wright Corporation,* 299 U. S. 304, 316-19 (1936), in which the Court in broad dicta quite erroneously regarded the treaty-power, not as a delegated power, but as a power inherent in sovereignty.[4]

While some argument has been made that such dicta as contained

1. 1904-5; see 75 *A.B.A. Rep.* 553 (1950); see also *Who Was Who,* Volume 1, page 1256. The "Trojan horse" characterization occurs on page 339 of his book.

2. This statement represents the agreed views of the American Bar Association's Committee on Peace and Law Through United Nations, and of that Association's Section of International and Comparative Law in a joint report. See Report of Committee on Peace and Law, September 1, 1951, page 36.

3. *An International Bill of Rights of Man,* page 179.

4. It is believed (and the decisions based on the law of nations cited by the court confirm that belief) that the *Curtiss-Wright* decision confuses the position of the United States as viewed under international law by foreign nations with the position of the United States in international relations as a matter of domestic constitutional law. Under the Constitution the treaty-power is *expressly delegated* to the United States (Article II, §2) and *expressly prohibited* to the states (Article I, §10). Other cases accurately refer to the treaty-power as having been "delegated expressly". See *Missouri* v. *Holland,* 252 U.S. 416, 432, and cases cited in Report of Committee on Peace and Law, February 1, 1952 (Third Printing, May 1, 1952) page 8. The report referred to analyzes and criticizes the *Curtiss-Wright* case. A similar criticism of that case is found in Mr. Justice Jackson's concurring opinion in the *Steel Seizure Cases,* decided June 2, 1952, footnote 2, in which he says "Much of the Court's opinion is *dictum*", and points out that the case involved solely power expressly delegated to the President in an act of Congress.

in *The Cherokee Tobacco,* 11 Wall. 616, 620-1 (1870), and *Geofroy* v. *Riggs,* 133 U. S. 258, 267 (1889), (the treaty power does not "authorize what the Constitution forbids") should abate all fears on this subject[5], the fact remains that *Missouri* v. *Holland, supra,* and *United States* v. *Curtiss-Wright Corporation, supra,* go in the opposite direction toward an unlimited treaty-power.

In *Missouri* v. *Holland, supra,* it was recognized that the Constitution did *forbid* congressional control over migratory birds in the sense that the power was not delegated, and was, therefore, reserved to the states under the Tenth Amendment. It had been so held in cases cited in the Court's opinion. The *Curtiss-Wright* case, *supra,* dealt only with an express congressional delegation of power to the President authorizing him in certain circumstances to forbid the sale of arms to foreign countries, and did not involve the treaty-making power; nevertheless broad dicta were made with reference to it, which viewed from the standpoint of international law through the eyes of a foreign nation may be acceptable, but not as domestic constitutional law, under which the treaty-making power is a delegated power.[6]

Question Should Be Settled Once and for All Time

In any event, since the last dozen years have seen hundreds of earlier decisions overruled and disregarded, it seems appropriate not to rest content on the dicta of early cases, but to settle by unequivocal language once and for all time that treaty-making power cannot be used for purposes in conflict with the Constitution.

Richard Henry Lee, of Virginia, and Patrick Henry, of Virginia, both strongly objected to the treaty clause at the time the adoption of the Constitution was under debate.[7] It is clear from the sharp debates over the lodgment of the treaty-power, and the effect of its exercise, that the founding fathers definitely visualized the possible need for amendment.[8] Jefferson, who, by reason of his ambassadorship to France, was not a member of the Constitutional Convention, did concern himself greatly with ratification and with the first ten amendments, and in his *Manual of Parliamentary Practice* had this to say:

> By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaties, and cannot be otherwise regulated.
>
> *It must have meant to except out all those rights reserved to the states; for surely the President and the Senate cannot do by treaty what the whole government is interdicted from doing in any way.* [Italics supplied]

The addition of the Bill of Rights to the original Constitution was thought to have counteracted the dangerous loophole in the treaty supremacy clause of Article VI and to control its interpretation. It is certainly plain from the whole history of the Constitution and of the first ten amendments that it was never intended, or even remotely contemplated, that the established constitutional balance between state and federal power could be substantially upset by the exercise of the treaty power.

At the time the Constitution was adopted and until recently, treaties entered into by the United States were compacts in the primary sense of duties and obligations imposed on the contracting states, and not on individual citizens.

Alexander Hamilton stated that treaties "are contracts with foreign nations which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign."[9]

Today, however, treaties are being proposed, and at least one has been submitted to the Senate for ratification, which impose civil and criminal liability for acts of citizens of the United States, or which affect rights of and impose duties and obligations on, citizens of the United States, in areas heretofore within the reserved powers of the states.[10]

The late Chief Justice Charles Evans Hughes, former Secretary of State and former Judge of the Permanent Court of International Justice at The Hague, speaking as President of the American Society of International Law, said to that body on April 26, 1929:

> If we take the Constitution to mean what it says, it gives in terms to the United States the power to make treaties. It is a power that has no explicit limitation attached to it, and so far there has been no disposition to find in anything relating to the external concerns of the nation a limitation to be implied.
>
> Now there is, however, a new line of activity which has not been very noticeable in this country, but which may be in the future, and this may give rise to new questions as to the extent of the treaty-making power. I have been careful in what I have said to refer to the external concerns of the nation. *I should not care to voice any opinion as to an implied limitation on the treaty-making power. The Supreme Court has expressed a doubt whether there could be any such. That is, the doubt has been expressed in one of its opinions.* But if there is a limitation to be implied, I should say it might be found in the *nature* of the treaty-making power.
>
> What is the power to make a treaty? What is the object of the power? The normal scope of the power can be found in the appropriate object of the power. The power is to deal with foreign nations with regard to matters of international concern. It is not a power intended to be exercised, it may be assumed, with respect to matters that

5. See *State Department Bulletin,* December 31, 1951, page 1062. In *United States* v. *New Orleans,* 10 Pet. 662, 763 (1836), the Court said: "The government of the United States, as was well observed in the argument, is one of limited powers. It can exercise authority over no subjects, except those which have been delegated to it. Congress cannot, by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power." The reasoning of this case conflicts with *Missouri* v. *Holland.* See 37 A.B.A.J. 856, footnote 131.

6. See footnote 4.

7. See Eberhard P. Deutsch, "The Treaty-Making Clause: A Decision for the American People", 37 *A.B.A.J.* 662 (1951). 3 *Elliot's Debates* (2d Ed.) 503.

8. 2 Farrand, *Records of the Federal Convention* (Rev. Ed. 1937) page 370; see also 3 Farrand 136, 286-287; 1 Farrand 164, 245; 2 Farrand 297.

9. *The Federalist,* No. 75.

10. Florence E. Allen, *The Treaty as an Instrument of Legislation* (Macmillan Co., New York, 1952) pages 10 and 11. Judge Allen is a United States Circuit Judge for the Sixth Circuit.

have no relation to international concerns. . . .

But if we attempted to use the treaty-making power to deal with matters which did not pertain to our external relations but to control matters which normally and appropriately were within the local jurisdictions of the States, then I say there might be ground for implying a limitation upon the treaty-making power that it is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power[11] [Italics supplied].

But, the present State Department takes a position contrary to the implied limitation suggested by the late Chief Justice. In a statement released by the State Department in September, 1950, with foreword by President Truman, it is said in the opening sentence:

> There is no longer any real distinction between "domestic" and "foreign" affairs.[12]

Moreover, notwithstanding the provision in Chapter I, Article 2, paragraph 7, of the United Nations Charter that "nothing contained in the present charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State", the broad claim is made by proponents of the use of treaties to enact world law binding within the United States that

> Once a matter has become, in one way or another, the subject of regulation by the United Nations, be it by resolution of the General Assembly, or by convention between member states at the instance of the United Nations, *that subject* ceases to be a matter being "essentially within the domestic jurisdiction of the member states". As a matter of fact, such a position represents the official view of the United Nations, as well as of the member states that have voted in favor of the Universal Declaration of Human Rights.[13]

The growing tendency to undertake to create a basis for enlarging federal power by congressional enactments under the treaty clause, not otherwise within the constitutional grant of legislative power in the absence of a treaty, is illustrated by the Report of the President's Committee on Civil Rights:

> The Human Rights Commission of the United Nations is working on a detailed international bill of rights designed to give more specific meaning to the general purpose announced in Article 55 of the Charter. If this document is accepted by the United States as a member state, an even stronger base for Congressional action under the treaty power may be established.[14]

Indeed, it is asserted (Report of Section of International and Comparative Law to the House of Delegates of the American Bar Association, Mid-Year Meeting, February 25-26, 1952) that "so far as the requirement of indictment by grand jury and trial by jury are concerned, these apply only to trials in the Federal courts, and can have no application to an international court set up by a group of nations in the exercise of their treaty-making powers. . . . There is no reason why such courts may not be created in the exercise of the treaty-making power."

In other words, it is claimed that the United States Government can provide under the treaty-making power for the trial abroad of an American citizen, for offenses committed here, by methods and in places (see Sixth Amendment) which the Constitution forbids, and without the safeguards which the Constitution commands.[15]

Dissent in Steel Case Shows the Danger

In the Steel Seizure Cases,[16] Chief Justice Vinson, dissenting, with the support of two other judges, made the pronouncement that the United Nations Charter and the North Atlantic Treaty, being treaties, whose

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purpose is the suppression of agression, give the President the power to seize private property, though he lacks statutory authority, and though the majority of the Court holds he has no such power under the Constitution, and that he is denied the power under the Fifth Amendment to take property without due process of law and without just compensation. If two additional judges had accepted the view of the Chief Justice, the treaty known as United Nations Charter and the North Atlantic Treaty, made by the President and consented to by the Senate, would have effected a fundamental change in the American form of Government without the Congress, as such, or the states or the people (to whom all powers not delegated are reserved under the Tenth Amendment) having anything to say about the matter.

The laws of the several states require lawyers to be first and foremost citizens of the United States

11. *Proceedings of the American Society of International Law*, 1929, pages 194-196.

12. Opening sentence of State Department Publication 3972, Foreign Policy Series 26, with Foreword by President Truman.

13. Moses Moskowitz, "Is the U. N.'s Bill of Human Rights Dangerous?" 35 *A.B.A.J.* 283, 285 (1949). Compare also the statement of John P. Humphrey, formerly Director of the Division of Human Rights of the United Nations: "What the United Nations is trying to do is revolutionary in character. Human rights are largely a matter of relationships between the state and individual, and therefore a matter which has been traditionally regarded as being within the domestic jurisdiction of the states. What is now being proposed is, in effect, the creation of some kind of supranational supervision of this relationship between the state and its citizens." (Annals of American Academy of Political and Social Science, January 1949.) And Mr. Moskowitz in the article just referred to, says that "the idea of a supranational supervision of the relationship of a state to its own citizens . . . is the real crux of the matter, revolutionary as it may appear. . . ."

14. Report of President's Committee on Civil Rights, paragraph 10.

15. See Report of Committee on Peace and Law, September 1, 1951, page 30.

16. *Youngstown Sheet & Tube Co. v. Sawyer*, June 2, 1952, 72 S. Ct. 863, 929.

and to swear allegiance to the Constitution of the United States. The treaty with Israel recently transmitted to the Senate by the President and the State Department provides that nationals of either country shall not be barred from practicing professions in the other country by reason of their being aliens, if they comply with other requirements, such as residence and competence. Under the "most-favored-nation" clause included in many treaties to which the United States is a party, the foregoing provision, if it goes into effect, would automatically be applicable to the nationals of a very large number of countries. In a number of states teachers in primary and secondary schools are required to be citizens of the United States. Many bar associations have protested this clause in the Israel treaty to the Senate Foreign Relations Committee as unsound and dangerous, and as an improper invasion of the rights reserved to the states.

As an actual recent instance of a treaty changing domestic law, we have the Warsaw Convention relating to international air transportation, approved by the United States Senate some years ago. It now appears that this treaty deprives American citizens of their right to complete trial by jury, because it is the essence of a constitutional jury trial in this country in a civil case that the jury shall determine the amount of damage that is fair and reasonable. The Warsaw Convention contains a provision limiting the damage liability of international air carriers for personal injury or death of passengers in aircraft disasters to the sum of 125,000 gold French francs, or the equivalent, in United States currency, of approximately $8,300, a hopelessly inadequate sum. The limitation of liability clause of the Warsaw Convention, being a treaty, has been held to be the supreme law of the land and to override state law and policies.[17]

A further example of the impact of treaties on the judicial mind occurred on June 16, 1952, in Idaho, where Judge Preston Thatcher of the Sixth Circuit, at Blackfoot, decided that the United Nations Charter was supreme over state law. The plaintiff's attorney in that case undertook to ask the wife of the defendant in a suit to quiet title whether her husband was a citizen of the United States at the time of marriage, for the purpose of showing that if the husband was not, he could not own land under Idaho's alien land law. Judge Thatcher ruled that the United Nations Charter "prohibits discrimination by reason of race" and supersedes the alien land law of the State of Idaho.[18]

It is true that the Supreme Court of California, refusing to follow the intermediate appellate court of that state, has recently held that Articles 55 and 56 of the United Nations Charter are not self-executing, and therefore those treaty provisions do not *ipso facto* invalidate the alien land law of the State of California enacted by the people in 1920;[19] but the majority of that court found that the United Nations Charter represents "a moral commitment of the foremost importance"; and it seems fairly clear that (just as in *Perez* v. *Lippold*, 198 P. 2d 17, a four-to-three decision invalidating California's law prohibiting mixed marriages, decided by the same court with the identical division of judges in 1948) the majority opinion of the Supreme Court of California, in holding the California alien land law invalid under what it conceived to be a more modern concept of the equal protection clause of the Federal Constitution, was influenced by the "moral commitments" of the Charter.[20] Hence, while the Supreme Court of California holds that the United Nations Charter is not a self-executing treaty in Articles 55 and 56, the Charter produces the same effect on the judicial mind, with the result that the majority of the judges adopt a new construction of the equal protection clause of the Fourteenth Amendment, disregarding earlier state and United States Supreme Court decisions on the identical statute to the contrary.[21]

It is the foregoing evolution in the purpose and scope of treaties and their already established impact on judicial thinking, and the veritable barrage of new treaties sponsored by the United Nations and its affiliated organizations,[22] which have given rise to the widespread demand for a constitutional amendment "to make it impossible hereafter for any federal or state court to hold that a foreign nation can participate in legislating for the people of the United States under the treaty-making clauses of the Constitution".[23]

House of Delegates Endorses Amendment

It being the opinion of the American Bar Association that such a constitutional amendment is necessary, the House of Delegates of the Association, on February 26, 1952, recommended to the Congress of the United States, for consideration, the following constitutional amendment limiting the treaty-making power:

> A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect. A treaty shall become effective as internal law in the United States only through legislation by Congress which it could enact under its delegated powers in the absence of such treaty.[24]

This action was taken on recom-

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17. *Garcia* v. *Pan American Airways*, 55 N.Y.S. 2d 317 (1945), affirmed, 295 N.Y. 852, 67 N.E. 2d 257; *Lee* v. *Pan American Airways*, 89 N.Y.S. 2d 888, 300 N.Y. 761, 89 N. E. 2d 258 (1949), *certiorari denied* 339 U. S. 920.

18. Power County Press, American Falls, Idaho, June 19, 1952, page 4; reprinted in Cong. Rec. June 24, 1952, page A 4169.

19. *Fujii* v. *California*, Sup. Ct. of Cal., April 17, 1952, 38 Adv. Cal. Rep. 817. See review of this case in 38 *A.B.A.J.* 559, July, 1952. It is not the purpose here to express any opinion whether mixed marriages or alien land ownership are good or bad, but simply to express the belief that it is the right of the sovereign people of California to make their own laws on such domestic matters without the aid or interference of foreign governments.

20. *Ibid.*

21. 38 *A.B.A.J.*, 559, July, 1952.

22. It is reliably reported that the United Nations and its affiliated organizations have over 200 treaties "in the works", in the social, economic and political field.

23. George A. Finch, "The Treaty-Clause Amendment: The Case for the Association", 38 *A.B.A.J.* 467, 470, June, 1952.

24. See Proceedings of House of Delegates, 38 *A.B.A.J.* 435, May, 1952.

The Patent Grant and Free Enterprise:

The Abuses of Patent Monopolies

by **H. Graham Morison** • Former Assistant Attorney General of the United States

■ In view of the fact that a patent grants the exclusive right to make, use and sell the subject-matter of the patent and that the ownership of numerous patents by corporations large and small is inherent in the economy of today, situations are bound to arise wherein the Department of Justice is very active in invoking the antitrust laws.

In this article Mr. Morison makes a clear statement of the patent philosophy of the Department of Justice and has included a concise summary of numerous cases in which the contentions of the Department, through judicial pronouncement, have become the law of the land.

Mr. Morison predicates his position on the premise that the present patent law is ancient and obsolete and suggests that public policy now requires such restriction by the courts. It is important to remember that on July 19, 1952, President Truman approved the Patent Codification Act (H.R. 7794—Bryson), which will become effective on January 1, 1953. A study of the Act has disclosed that in certain respects the law of patents has been strengthened rather than weakened, and in particular instances, such as the law of contributory infringement and the doctrine of misuse of patents, the legislature actually has overturned existing court-made law.

■ The American system of competition within a free economy, which was first given legislative expression in the Sherman Act of 1890[1], is a natural outgrowth of the concept of individual liberty which is fundamental under American principles of law. The concept that an individual should be able to conduct his own business and affairs without interference, except for the legitimate competition of others and except for such safeguards as may be imposed in the public interest, is founded upon common law principles which have roots in the Magna Charta.

The Sherman Act was enacted in an era in which giant trusts had attempted to suppress competition in the marketing of goods and services, "the monopolistic tendency of which had become a matter of public concern".[2] The Act condemns as illegal all contracts, combinations and conspiracies "in restraint of trade", and provides criminal penalties for every person who shall make or enter into any such contract, combination or conspiracy. It also makes it a crime "to monopolize, to attempt to monopolize, or combine or conspire with any other person, or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations".[3] Chief Justice Hughes described the Act as a charter of freedom comparable to a constitutional provision.[4]

The principles expressed by the Sherman Act were well established in the common law. All agreements that restricted or suppressed competition in the market were illegal, including agreements to fix prices, divide marketing territories, apportion customers, restrict production and similar practices tending to deprive buyers or consumers of the advantages of free competition.[5]

The patent laws take quite a different approach. Article I, Section 8 of the Constitution provides that the Congress shall have power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries". In accordance with the constitutional authorization, Congress enacted the patent laws which provide for a grant to inventors "for a term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery . . . throughout the United States and the territories thereof".[6]

The patent laws today are substantially the same as those embodied in

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1. 26 Stat. 209; 15 U.S.C. §§ 1-7.
2. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 492-493 (1940).
3. 15 U.S.C. §§ 1 and 2.
4. *Sugar Institute, Inc. v. United States*, 297 U.S. 553, 600 (1936); *Appalachian Coals v. United States*, 228 U.S. 344, 359-360 (1933).
5. *Apex Hosiery Co. v. Leader, supra*, note 2, at 477. See *Standard Oil v. United States*, 221 U.S. 1, 54, with respect to the historical origin of the Sherman Act.
6. Rev. Stat. §4884; 35 U.S.C. §40.

the Patent Act of 1870; in fact, no fundamental change has taken place in our patent system since the Patent Act of 1836. During this period, however, our economy and the manner of using inventions and patents have changed drastically. An industrial revolution has taken place in the United States within the past hundred years and the simple agrarian economy of the early years of our nation has been succeeded by a complex industrial system necessitating tremendous plants and factories and involving highly developed technology.

In 1951, the Patent Office issued over 44,000 patents. It is estimated that, of the 2,500,000 patents which have been issued, approximately 50 per cent have ultimately gone into corporate hands, and that 90 per cent of the economic worth of all patents issued have inured to the benefit of corporations. In modern times, the inventor is usually in the employ of a large corporation and is under contract to assign his inventions and patent rights to that company. There are, of course, individual and independent inventors, but they are becoming the exception rather than the rule.

Patent Grant Is Often Abused

All this has significance from an antitrust standpoint. Virtually all the Government's antitrust cases relating to patent abuses have involved the misuse of patents by large industrial concerns rather than by individual inventors. The decided antitrust cases involving patents make it plain that many large corporations have attempted to use the patent grant as a means for engaging in activities that would otherwise be illegal. In attacking such a misuse of the patent right, the Department of Justice is not attacking the patent grant. In fact the suits brought against abuse of the patent grant have been intended to support, and have supported, the valid exercise of the patent grant.

The patent system, when operating as the framers of our Constitution intended that it should operate, is not at odds with the objectives of our free enterprise economy. The purpose of our patent laws is to stimulate the inventor to invent, to provide encouragement to the development and commercialization of new products, thus enriching our commerce and making available the benefits of new inventions to all the people. Just as our system of free enterprise has demonstrated that it best guarantees the widest distribution of the finest goods and services our industry is able to produce, so the patent system assures the constant technical advancement of our economy.

Early in our history, the promotion of science and useful arts was considered to be the primary objective of the patent system. The classic statement of this is the oft-quoted statement by Mr. Justice Story in *Pennock* v. *Dialogue*:[7] "While one great objective was by holding out a reasonable reward to inventors, and giving them an exclusive right to their inventions for a limited period, to stimulate the efforts of science, the main objective was to promote the progress of science and useful arts." This concept has been reiterated in many cases.[8]

The Supreme Court, with the exception of a line of cases which will be referred to later, has consistently interpreted the patent laws as being strictly limited to the constitutional and statutory grant. Virtually all the so-called conflicts between the patent and antitrust laws have arisen because of abuse of the patent monopoly. Absent such abuse, the patent grant fits consistently into the framework of our system of competitive enterprise. As stated by Mr. Justice McKenna in *Standard Sanitary Manufacturing Company* v. *United States*:[9]

> Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights a universal license against positive prohibitions. The Sherman law is a limitation of rights,—rights which may be pushed to evil consequences, and therefore restrained.

Mr. Justice Brandeis voiced the same view in the *"Gasoline Cracking"* case,[10] stating that "The lawful individual monopolies granted by the patent statutes cannot be unitedly exercised to restrain competition", and Chief Justice Stone in the *Univis*[11] case spoke of "the public policy which limits the granted monopoly strictly to the terms of the statutory grant".

Supreme Court Deviates from Strict Construction

It is true that the Supreme Court deviated from a strict construction of the patent grant in a line of cases, now for the most part overruled, dealing with patent license restrictions.

In *Bement* v. *National Harrow Company*[12] the Court said:

> The very object of these [patent] laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee for the right to manufacture or use or sell the article, will be upheld by the courts.

This doctrine originated in the so-called "Button-Fastener" case[13] in which it was held that patented machines could, by notice, be restricted to use with unpatented supplies necessary in their operation but not a part of the machines. This decision was followed by the Supreme Court in *Leeds & Catlin Company* v. *Victor Talking Machine Company (No. 2)*[14] and in *Henry* v. *A. B. Dick Company*.[15] In the former case, the Court went so far as to hold that it was contributory infringement for a supplier to supply unpatented records for use

7. 2 Pet. 1, 19 (27 U.S. 1829).
8. *Winans* v. *Denmead*, 15 How. 330, 344 (56 U.S. 1853); *Kendall* v. *Winsor*, 21 How. 322, 327-8 (62 U.S. 1858); *Dr. Miles Medical Company* v. *Park, etc., Company*, 220 U.S. 373, 401 (1911); *Motion Picture Patents Company* v. *Universal Film Manufacturing Company*, 243 U.S. 502 (1917); *Mercoid Corp.* v. *Mid-Continent Investment Company*, 320 U.S. 661 (1943); *United States* v. *Line Material Company*, 330 U.S. 287 (1948).
9. 226 U.S. 20, 49 (1912).
10. *Standard Oil Co. (Indiana)* v. *United States*, 283 U.S. 163, 174 (1931).
11. *United States* v. *Univis Lens Co., Inc.* 316 U.S. 241, 251 (1942).
12. 186 U.S. 70, 91 (1902).
13. *Heaton-Peninsular Button-Fastener Co.* v. *Eureka Specialty Co.*, 25 C.C.A. 267, 47 U.S. App. 146, 77 Fed. 288 (6th Cir. 1896).
14. 213 U.S. 325 (1909).
15. 224 U.S. 1 (1912).

in a patented combination consisting of the Victor phonograph stylus and the record upon which it played. Both the stylus and the record had formerly been patented and these patents had expired.

The *General Electric* case in 1926 followed the rationale of the *Bement* case and held that a patentee could fix the price at which his licensee should sell the patented product. The Court stated the rule to be that the patentee may grant a license "for any royalty or upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure".[16]

The *A. B. Dick* case was overruled in 1931 by the *Motion Picture Patents* case,[17] the *Leeds & Catlin* case was overruled by the *Mercoid* cases,[18] and the *General Electric* case has been restricted to a very narrow scope by *United States* v. *Line Material Co.*,[19] the Court being divided on the question of overruling it entirely. In the last-mentioned case the Court went back to a strict construction of the patent grant, Mr. Justice Reed stating in the majority opinion:

> Nor can anything be found in the *General Electric* case which will serve as a basis to argue otherwise than that the precise terms of the grant define the limits of the patentee's monopoly and the area in which the patentee is freed from competition of price, service, quality or otherwise.[20]

The basis of the holdings in the *Bement* and other cases cited above which upheld restrictions and conditions upon use of the patented article was that, since the patentee may withhold his patent altogether from public use, he must logically be permitted to impose any conditions which he chooses. Mr. Justice Clarke, in the *Motion Picture Patents* case, pointed out that this thinking was erroneous in that rights under patents were confused with private contractual rights. The latter are subject to the rules of general, as distinguished from patent, law.[21]

In the past several months, certain articles and speeches have criticized the principles stated by our courts in Sherman Act violations which have resulted from the abuse of the patent grant. Equal criticism has been directed at the legal positions taken by the Antitrust Division of the Department of Justice in its prosecution of these cases. It has even been suggested that the decisions of the courts have so destroyed or depreciated the value of the patent right as to take away the encouragement of inventiveness.

Antitrust Division Is Not Attacking Patents

The Antitrust Division has properly interested itself in those abuses of the patent monopoly which have resulted in Sherman Act violations. This implies neither an attack upon the patent system nor an attempt to take away from patentees legitimate rights which they may exercise under their patents. The Supreme Court has clearly enunciated the salutary rule that the statutory grant to a patentee which protects his right to exploit the manufacture, use and sale of the patented article for a period of seventeen years, may not be used in such manner as to create a monopoly or to unlawfully restrain our commerce in contravention of the antitrust laws. This does not detract from the lawful exercise of the patent right, but rather supports its legitimate use and exploitation.

A review of some of the more important antitrust cases involving patents clearly indicates that neither the Department of Justice nor the courts have made an attack upon the legitimate use of the patent grant. The rules of law which have evolved from these antitrust patent cases conform to the basic principles both of the antitrust laws and of the patent laws and reveal no attempt by the Department of Justice or by the courts to "socialize" our patent system, as has been charged in one article. These principles are calculated to strengthen our free and independent American enterprise, and to protect freedom of business opportunity.

The *Hartford-Empire* case[22] was a landmark in the application of the antitrust laws to patent abuses. The leading manufacturers of glassware had combined with the leading manufacturers of the glass container industry to acquire all useful patents covering glass-making machinery and to license the patents thus pooled under such restrictive terms and conditions as would effectively limit competition and regulate the glassware and glass container industry. Hartford and the other defendants, having successfully acquired nearly all significant patents in the art, held such absolute control over this combined industry as to prevent the entrance of any competitor, to regulate the price of the articles pro-

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16. *United States* v. *General Electric Co.*, 272 U.S. 476, 489 (1926).
17. *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U.S. 502 (1917).
18. *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U.S. 661 (1943); *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 320 U.S. 680 (1943).
19. 330 U.S. 287 (1948).
20. *Id.* at 300.
21. *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U.S. 502, 514 (1917).
22. *Hartford-Empire Co.* v. *United States*, 323 U.S. 386 (1945); 324 U.S. 570 (1945).

duced, to limit production, to divide the fields of manufacture and, in short, to effectively remove this important industry from competition. The Supreme Court upheld the District Court's decision that the scheme was unlawful and also sustained the requirement of compulsory licensing of the defendants' patents.

The beneficial economic effects of the judgment upon the glassmaking industry have been significant. Perhaps the most noteworthy has been the saving of the more than $5,000,000 annually in royalties which had been paid by the industry to this illegal monopoly. Another important result has been the ability of certain glassware manufacturers to enter into the production of various items of ware from which they had earlier been excluded. Before the judgment, only three manufacturers produced fruit jars, two of whom were restricted to limited quantities. Now, a number of additional manufacturers produce fruit jars. Prior to the decree, only one manufacturer produced heat-resistant ovenware. Today, several companies have entered this field.

The facts of the *Hartford-Empire* case illustrate the public need which requires antitrust prosecutions in cases in which the patent grant has been extended beyond the protection of the statutory grant and is being used to create or to foster illegal restraints upon the commerce of our nation. It is self-evident that in the *Hartford-Empire* case the Government made no attack upon the legal rights granted by statute to patent owners.

The case of *United States* v. *Univis Lens Co., Inc.*[23] involved an attempt to use the patent monopoly as a device for resale price maintenance in the important field of eyeglasses.

The Univis Corporation licensed its subsidiary, Univis Lens Company, to manufacture and sell lens blanks, that is, partly processed pieces of glass, to designated licensees to be ground and refinished for bifocal eyeglasses by the licensee purchasers. The blanks and the finished lenses were covered by patents of Univis Corporation which the Court assumed to be valid. Univis Corporation initially licensed wholesalers to grind and refinish the blanks, then licensed finishing retailers to polish and adjust the lenses, and finally licensed prescription retailers to sell the finished lenses, prescribing the resale price in each instance. It received a royalty of 50 cents on the sale of each blank.

The record of this case showed that, under this regimented price structure, the price of a pair of spectacles jumped from $3.25 a pair to wholesalers to $15.00 and $20.00 a pair to consumers.

Univis Case Sets Boundary to Scope of Patent Monopoly

The Supreme Court, speaking through Chief Justice Stone, held that the patentee could not extend his control over the patented article after the first sale of the blanks, which carried with it an implied license to grind and finish. Following this decision, a decree was entered enjoining Univis from enforcing any provision of its existing contracts or of any other agreement which either fixed resale prices, designated customers to whom lenses could be sold, or restricted the purpose for which, or the channel through which, they might be sold.

In a subsequent proceeding, a responsible official of Univis stated that the outcome of the case benefited his company's business by broadening the market for its products. This significant statement underlines the fact that restraints of trade often have an adverse effect even upon those companies which impose the restraints.

The *Univis* case is important in that it sets a definite boundary to the scope of the patent monopoly; that is, that a patentee parts with his monopoly once the patented article has been sold.

The case of *United States* v. *Masonite Corporation*,[24] again illustrates the principle that a patentee cannot use his patents to justify restraints of trade beyond the scope of the patent monopoly.

In that case, the Masonite Corporation was a large manufacturer and distributor of hardboard, a dense, grainless, synthetic board used for wall board, flooring, ceiling, etc., and held patents upon this product.

Later, the Celotex Corporation entered this field and became a large producer. Several patents were issued to Celotex. Masonite instituted suit against Celotex for infringement of one of its patents and prevailed in the lower courts. While the appeal was pending, the litigation was settled on the basis of an agreement by which Masonite appointed Celotex a *del credere* agent to sell its hardboard products and Celotex acknowledged the validity of Masonite's patents.

Masonite later made substantially the same agreement with other manufacturers of building materials and related products, giving each "agent" a license to sell under its patents. The agreement included an option for a manufacturing license but few of the agents exercised it because of the prohibitively high cost. Thus, competitors were cut off from manufacturing hardboard.

The agency agreement, among other things, fixed the prices at which the agents were to sell, restricted the agents to the construction field, bound the agents to buy hardboard only from Masonite, and also bound them not to manufacture or sell competing products. Each agent knew of the other agreements.

Patent Owner May Not Extend Grant by Contract

The Supreme Court held that this was an unlawful combination which was not saved from illegality either by the agency arrangement or by the patent monopoly. The Court stated that the owner of a patent may not extend his statutory grant by contracts. In the final judgment the agency contracts were declared illegal and the defendants were enjoined from agreeing among them-

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23. 316 U.S. 241 (1942).
24. 316 U.S. 265 (1942).

The Labor Monopoly Problem:

Gwinn-Fisher Bill Would Effect Reforms

by **Theodore R. Iserman** • of the New York Bar (New York City)

■ The application of federal antitrust laws to certain activities of labor organizations has been discussed and considered by various Association Sections and Committees. At the last Mid-Year Meeting in Chicago, the House of Delegates approved a resolution of the Section of Corporation, Banking and Business Law and the Standing Committee on Commerce advocating amendments to the Sherman Act to forbid union combinations, conspiracies and contracts interfering with and restraining commercial competition in interstate commerce.

At the Mid-Year Meeting, the Council of the Section of Labor Relations Law, by majority vote, announced that it favored dealing with the problem by specific statutory restrictions.

On May 1, 1952, H.R. 7697 and H.R. 7698 were introduced by Representative Gwinn (R., N.Y.) and Representative Fisher (D., Tex.). These bills were later reintroduced, with minor changes, as H.R. 8449. The Gwinn-Fisher Bill follows in the main the suggested statute recommended by the Council of the Section of Labor Relations Law.

In view of the widespread interest in the entire subject matter, the *Journal* invited comments on the Gwinn-Fisher Bill by Theodore R. Iserman, of the New York Bar, and Alfred Kamin, of the Chicago Bar. Mr. Iserman participated in the drafting of the statute recommended by the Council of the Labor Relations Law Section. He is a member of the Council and was formerly its Chairman. Mr. Kamin, Vice Chairman of the Section, was the principal spokesman in opposition to the proposal when it was under discussion in the Council of the Section.

■ What we have come to call "emergency strikes" usually are uppermost in our minds when we think of labor monopoly and industry-wide bargaining.

But these so-called "emergency" strikes are not the greatest evil of labor monopoly. On the contrary, they may be a blessing in disguise. When one occurs, it may be and usually is because one party to the bargaining is disagreeing with the other as to how far they may go jointly in hijacking the public.

Emergency strikes are the spectacular results of labor monopoly, but more important than these are (1) the stifling effects of labor monopoly upon competition, (2) the restraints of trade in which unions engage, and (3) the collusive arrangements between employers and unions that limit competition, raise prices and restrict output. All of these are parts of the monopoly problem.

Congress has considered many methods of dealing with emergency strikes—seizure, injunction, drafting strikers into the Army. Instead of going to the root of our trouble, these expedients hack at the branches. The root of our trouble is labor monopoly. We can abolish industry-wide strikes and at one and the same time abolish other evils of labor monopoly that operate day in and day out, year in and year out, and that in the aggregate do even more to harm our economy than the disastrous strikes with which these proposals before Congress try to deal.

I.

H.R. 7697, introduced in the House of Representatives by Congressman Gwinn of New York and Congressman Fisher of Texas, goes directly to the root of our trouble.

Up to 1935, when Congress passed the National Labor Relations Act, our laws, as the Supreme Court has construed them, merely granted immunity to monopolistic practices of labor organizations. But now, under the Wagner Act, even as Taft-Hartley amends it, when a union represents the majority of the employees in a bargaining unit, the law forbids the employer to deal with anyone other than that union. This is compulsory monopoly, enforced by law. When limited to a single employer, this is a monopoly with which I do not quarrel and with which the Gwinn-Fisher Bill does not concern itself.

But the same union or its locals,

which it controls and whose policies it dictates, can and ordinarily does represent employees throughout an entire industry or most of it.

Unions now claim 15,000,000 members. Nearly all our great industries—steel, coal, automobiles, rubber, oil, textiles, chemicals, trucking, railroads—are almost completely organized. And in most instances, a single union or combination of unions represents, through the monopoly by law that the Wagner Act sets up, employees throughout the industry; and that union or combination of unions dictates uniform labor arrangements throughout the industry.

A union's power, when it is limited to employees of a single employer, has no greater effect upon our economy than has the power of that employer to control his business. But when a union extends its control to employees of two or more competing enterprises, it creates monopolies of labor that can have upon our economy effects as adverse as can those combinations of businessmen that our antitrust laws forbid.

In our economy, we depend upon competition between employers to protect the public against high prices and to encourage business people to develop new and improved methods and techniques that provide at lower and lower prices more and more of the things our people need and enjoy. This system has given us the highest standard of living the world has ever known.

When a great and powerful union controls collective bargaining in an entire industry, the public loses much of the protection for which it depends upon competition. Wages and other terms of employment tend to become uniform and they tend to become uniformly high. The public pays the bill in higher prices.

Let us see how this comes about. When a single union controls the bargaining in an industry, each employer in the industry can be fairly certain that the union will impose upon his competitors substantially the same disadvantages it imposes upon him. It being unlikely that he will suffer a competitive disadvantage if he yields to excessive demands, his resistance to such demands is weaker than if he lacked that assurance.

When competing employers join together to negotiate a single contract with the union, they have still greater assurance that they can suffer no competitive disadvantage by yielding to uneconomic demands. They have still less incentive to resist such demands. And there is still less protection for the public against the high prices that result from complying with those demands.

The lessened incentive on the part of employers to protect the public against high costs and low output when they combine together to deal with a union makes monopolies of employment as bad for the public as monopolies of labor.[1]

Labor leaders inveigh against "competition in wages". In the first place, wages are not necessarily the most important element of what we call labor costs. Limits on effort and output, restrictions on using new and improved methods and techniques often add more to the cost of goods than higher wages. Removing these limitations and restrictions would enable many companies to lower costs and raise wages. Furthermore, anyone who has studied the history of wage movements, or who thinks in factual, not emotional, terms, knows that "competition in wages" tends to raise wages or to keep them high, not to depress them.[2]

Pay for personal services accounts for more than 80 per cent of the cost of manufactured goods. It therefore is obvious that uniform wages, uniform limitations on output and uniform restrictions on technical progress at every stage of the productive process leave but a small area within which employers can compete, and that a system of bargaining that tends to lessen employers' resistance to uneconomic demands has no justification in a free competitive economy.

Before proceeding, I wish to discuss, too briefly, the effect of labor monopoly upon collective bargaining.

The power of labor monopolies ordinarily is concentrated in the hands of one man or a few.[3] Even when a local of a national or international union is nominally the bargaining agent, the central office of the national or international union controls the bargaining. Consequently, purposes and interests of the head office, not those of the man at work, often shape the aims of the bargaining. The working man is only a pawn in the games of the great labor monopolists.

On January 2, 1947, Senator Murray, certainly no reactionary, as Chairman of the Special Committee To Study the Problems of American Small Business, reported the situation of much big business and most small business as follows:

> The growing tendency to first seek industry-wide labor contracts and then force their identical terms on all small independent firms in the industry wherever they may be located or however much their problems may differ from the giants in the industry, is freighted with extreme hazard for independent business. Many a small firm with a splendid record of labor-management relations is sucked into the maelstrom of national labor disputes with disastrous results for years afterward because they are not allowed to settle their labor problems in face-to-face relationships with their workers.

There is another aspect of the matter. Bargaining collectively is, at best, a painful process. This is especially true for the union's bargainers. They hold their offices in most cases by virtue of internal union politics. No matter on what terms they settle, there always is another union, or a political rival in their own union, who can say they should have done better. Hence, union officials ordinarily are happy when a government agency or some other decider relieves them of deter-

1. Leo Wolman, *Industry-wide Bargaining* (The Foundation for Economic Education, New York, 1948), page 28; Simons, "Some Reflections on Syndicalism", 52 *J. Pol. Econ.*, (March, 1941).

2. Hicks, *The Theory of Wages* (New York: The Macmillan Company, 1932; New York: Peter Smith, 1948), pages 58 *et seq.*

3. S. T. Williamson and Herbert Harris, *Trends in Collective Bargaining* (New York: Twentieth Century Fund, 1945), pages 13, 233 (note 7), 242-250.

mining on what terms to settle, particularly when the decider generally tends to favor unions.

In recent years, union leaders have learned that by precipitating nationwide strikes and creating "emergencies", they can force the Government to relieve them of their responsibilities as collective bargainers, as the steel union did in 1946, when the Government raised wages 16½ cents an hour and the price of steel $5.00 a ton; in 1949, when a government board violated the law and violated existing contracts in awarding pensions of a kind that Congress had disapproved, and again this year, when another government board recommended for the steel workers, during a period of supposed stabilization, the biggest wage increase in history, and fringe benefits besides.

By eliminating centralized control of bargaining, we would at the same time abolish other evils in industry-wide bargaining. We would provide the consuming public with far greater protection against unduly high prices and restricted output than it has now. And we would restore collective bargaining to the company level, where the employer and the representatives of his employees could bargain and reach agreement in the light of *their* wishes, *their* needs, and *their* circumstances, not according to the dictates of great labor monopolists far removed from the plants.

Gwinn-Fisher Bill Would Bring Reforms

The Gwinn-Fisher Bill (H.R. 7697) would bring about these reforms, which we must bring about if we are not to substitute some form of fascism for free enterprise and free collective bargaining.[4]

The bill would amend Section 2 of the Sherman Act, dealing with monopolies, to forbid industry-wide bargaining, either by unions or employers. It would allow employees of different employers to bargain together and allow the employers to bargain together, if (1) the employees do not number more than 5,000, (2) if they all work within twenty-five miles of the same city or town, (3) if the National Labor Relations Board has found that they constitute a unit appropriate for the purposes of collective bargaining, and (4) if their employers have designated a single representative as their bargaining agent.

Thus, 5,000 printers or truck drivers or construction workers in New York or Chicago could have a single bargaining representative, as could their employers. But a single representative could not monopolize labor in the automobile industry by representing the employees of General Motors, Chrysler, Ford and other motor concerns in Detroit, or monopolize labor in the rubber industry by representing all the rubber workers in Akron, to cite two examples.

The bill would permit all the employees of any company and its subsidiaries and affiliates to designate a single representative. Thus, all the employees in all the plants of United States Steel, wherever they may be, could have one union, or a unit of the United Steelworkers of America, as their bargaining agent. But the same union, or the same unit of the Steelworkers, could not also represent employees of other steel companies. The representatives of employees of different companies could not combine or conspire in their bargaining or strike in concert, and if they were part of a national or international union, the parent organization could not control their bargaining activities.

The bill, by the same token, would forbid employers, with the exception I have mentioned, to conspire concerning terms of employment of their employees.

The bill also would forbid an employer and a union to conspire to fix the terms of employment of employees of another employer.

The bill provides a summary procedure by which unions that now control the bargaining in plants of competing employers could assign their collective agreements and delegate their bargaining rights to affiliated unions or to constituent units of the parent organizations. The bill would allow them six months in which to do this.

Theodore R. Iserman is a native of Kansas. After graduating from the Law School of the University of Chicago in 1926, he practiced in France and, since 1928, he has practiced in New York City. A student of labor law, he is the author of *Industrial Peace and the Wagner Act* (1947).

II.

It is not merely by imposing identical terms and disadvantages upon all the employers in an industry that unions stifle the competition upon which we depend to protect our standard of living and to raise it.

Unions, either acting alone or in connivance with employers, engage in many other restraints of trade. As far back as 1869, John Stuart Mill commented upon union regulations that forbid progress and make work inefficient.[5] The United States Department of Justice has reported many practices in the building trades of a kind with those that shocked John Stuart Mill, and new ones that would have shocked him still more.[6] During the Roosevelt administration, the Department of Justice prosecuted many unions for engag-

4. Leland J. Pritchard, "The Role of Government in Labor-Management Relations", 33 Bulletin, American Association of University Professors, (1947), No. 4, page 680.

5. *Fortnightly Review*, May, 1869.

6. "Anti-Trust Cases in the Construction Industry", Senate Committee Print No. 12, 79th Cong., 2d Sess.

ing in these practices, and did so successfully until the Supreme Court, in the *Hutcheson* case, 312 U.S. 219 (1941), held that the Norris-LaGuardia Act virtually immunized both unions and employers against prosecution for restraints of trade disguised as collective bargaining.

The "bogus work" rule in the printing trades, limitations on the "height of the lay" in the clothing business, feather-bedding on the railroads, are other examples of restraints of trade that unions cannot justify.

Acting alone or in collusion with employers, unions exclude competing goods from particular markets, as they did in the *Allen-Bradley* case,[7] with the result that in New York certain electrical equipment costs two and three times what it costs across the river in New Jersey. Unions sometimes fix prices, striking employers who reduce prices, notwithstanding that the employers employ union labor and meet union standards. We find in the men and boys' clothing industry and in the women's wear field classic examples of what sometimes goes on behind the pleasant façade of harmonious labor relations.[8]

Many things that go on in the guise of collective bargaining are things for which employers, if they did them alone, could be fined and sent to jail under the antitrust laws. The effect upon the public is the same whether these restraints of trade result from conspiracies of employers, conspiracies of unions and employers or acts of unions alone. They have no place in our competitive system.

Gwinn-Fisher Bill Amends Sherman Act

The Gwinn-Fisher Bill brings them under the Sherman Act, where most of them were until the Supreme Court, not Congress, clothed them with immunity by its rulings in the *Hutcheson*[9] and *Carpenters*[10] cases.

The bill amends Section 1 of the Sherman Act to forbid striking in any manner other than by leaving work. It thus forbids sitdown strikes, slowdown strikes and the three-days-a-week strikes that John L. Lewis instituted a few years ago. This clause has no other effect on the right to strike, or on the objects for which unions may strike.

Later clauses limit the objects for which unions may strike. One forbids unions to strike to restrict the number of people who may enter or engage in a trade or calling, as many unions of skilled crafts do in order to create artificial shortages of labor.

Another forbids unions to engage in strikes or other concerted activities an object of which is to control or fix prices employers may charge for goods or services; to limit an employer's output; to limit the area in which an employer may do business or the persons with whom he may do business, or to limit the number of employers who may engage in a particular business. Since any strike indirectly affects an employer's prices, the places where or the persons with whom he does business or the number of people who engage in a business, the bill expressly provides that an otherwise lawful strike shall not be illegal merely because it incidentally has these effects.

A fourth clause forbids strikes an object of which is to impose featherbedding practices on employers. It defines featherbedding practices much as the Lea Act, which applies only to the radio broadcasting industry, defines them and as the Hartley Bill, which the House passed in 1947, defined them. In brief, the clause forbids strikes to force employers to hire employees they do not need, such as stand-by crews; to force employers to pay for work that no one does, or to pay more than once for work performed, and to force employers to limit the output of new and improved processes and equipment.

Sherman Act Violation Penalties Applicable to New Clauses

The present penalties for violating the Sherman Act would apply to violations of the new clauses.

The courts have so construed the Clayton Act and the Norris-LaGuardia Act as to make necessary, if the new law is to be effective, amending several sections of these Acts and Section 4 of the Sherman Act.

The bill would amend Section 4 of the Sherman Act to make the Norris-LaGuardia Act and Sections 6 and 20 of the Clayton Act inapplicable to suits by the Attorney General to restrain violations of the new clauses.

It would amend Section 6 of the Clayton Act, which says labor unions are not illegal combinations in restraint of trade, to make that section inapplicable to violations of the new clauses.

It would amend Section 20 of the Clayton Act, which limits the power of courts to restrain union activities, so as to make that section inapplicable to activities that violate the new clauses.

It would make the Norris-LaGuardia Act inapplicable in actions by the Government and suits for damages. That Act, except Section 6, would apply to suits by private parties for injunctions.

III.

The public, as well as members of Congress, are becoming increasingly aware of the tremendous and dangerous power of labor monopolists. They are becoming increasingly aware of the inflationary effect of higher wages for no more output year after year. Even members of unions are beginning to see that their so-called "gains" are illusory, lost in the higher prices they have to pay to meet the high wages other workers receive.

In an accompanying paper, my friend Alfred Kamin undertakes to oppose the Gwinn-Fisher Bill. Mr. Kamin and I debated the bill before the State Bar of Texas in July. He then used in masterly fashion the best

7. 325 U.S. 797 (1945).

8. Hearings before the Senate Committee on Banking and Currency, 81st Congress, 1st Sess., on Economic Power of Labor Organizations, pages 235 *et seq.*; Hearings before the Senate Committee on Labor and Public Welfare, 80th Congress, 1st Sess., on Labor Relations Program, pages 1576 *et seq.*; *United States v. Women's Sportswear Mfrs. Assn.*, 17 U.S. Law Week 4271 (U.S. Sup. Ct., 1949).

9. 312 U.S. 219 (1941).

10. 330 U.S. 395 (1947).

possible argument against the bill, namely: obfuscation.

He said that after receiving an advance copy of my talk, he had spent much time on the writings of economists. This seemed unfortunate. He would have learned much more from his daily paper, reading particularly about the steel strike. He would have learned that the Steel Workers' union was insisting upon uniform settlements with all employers, regardless of their circumstances. He would have learned that the steel companies had, in effect, capitulated to those demands of the union that involved increased labor costs on assurances from the Government that the public, not the employers, would bear the major burden of those costs. And he would have learned that the issue that prevented a settlement was union security, against the disadvantages of which the public could not indemnify the companies.

More than this, he would have learned that this year, more than in any other year, the steel companies were united in resisting the union's demands, and that it is the union that is forcing the companies to band together, not the companies that forced their respective employees to combine in one vast union.

It is unfortunate, too, that Mr. Kamin, instead of turning to the economists, has not turned to his law books. In them he would find scores of cases, many arising in his own City of Chicago, in which the Government proved and juries found that restraints of trade by unions acting alone and in collusion with employees, which Mr. Kamin seems never to have heard of, are common.

And it is unfortunate that Mr. Kamin did not listen to the comments of a bus driver who took Mr. Kamin and me through that fabulous City of Houston, and past a major oil company plant whose employees were striking. The driver, no lawyer and no doctor of philosophy, either, showed in colloquial but eloquent terms that he had a better understanding of the fallacies and dangers of centralized control of collective bargaining than some of the theoreticians and academicians on whom Mr. Kamin leaned.

Mr. Kamin spoke particularly of Galbraith's theory of "countervailing power", expressing the view that big unions grew up because some companies had grown big and powerful. But now unions have become bigger and more powerful than any company. Just as the Wagner Act gave a great boost to the "countervailing power" of labor unions in their dealings with employers, so the Gwinn-Fisher Bill proposes a method of countervailing, on behalf of the public, the tremendous power that labor monopolies have developed.

Mr. Kamin seemed to fear that forbidding centralized control of collective bargaining would make labor unions impotent. History shows him to be wrong. Monopolistic bargaining in industry generally is of fairly recent origin, dating from World War II, when the Government, through the War Labor Board and various industry panels, often found it convenient to impose settlements industry by industry, rather than company by company. It was the Government, also, that furthered industry-wide bargaining on the railroads, when it seized them in World War I. Autonomous unions, dealing with individual employers, effectively protected the interests of their members long before centralized control of their activities became general. Many single-employer, independent unions do so now.

Nor is it true that monopolistic unions exist only in "oligopolistic" industries, as Mr. Kamin seemed to think. Some of the strongest are in industries in which relatively small employers predominate, such as printing, contracting, trucking and clothing. One of the objects of the Gwinn-Fisher Bill is to afford a reasonable measure of protection to small employers and their employees in those industries where great companies and great unions predominate.

No amount of obfuscation can conceal the fact that labor monopoly limits competition, promotes inflation, results in catastrophic strikes that compel the Government to intervene and tends toward fascism. We cannot ignore the bare-faced conspiracies between some employers and some unions to restrain trade, as Mr. Kamin does.

We have no more important or more pressing domestic problem than the problem of labor monopoly. We must deal with that problem wisely and courageously. The Gwinn-Fisher Bill does just that.

The Fiction of "Labor Monopoly": A Reply to Mr. Iserman

by Alfred Kamin • of the Illinois Bar (Chicago)

■ It is not necessary to join issue with Theodore R. Iserman upon the feasibility of the procedures the Gwinn-Fisher Bill would erect to regulate the functions of labor organizations under the Sherman Act and other federal statutes. Since, in my view, the economic premises of the bill are fallacious,[1] no space will be here devoted to its proposed legal mechanisms.

It has been observed that "the ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. . . . Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist."[2]

The case for the Gwinn-Fisher Bill rests in the ideas of defunct economists. The thesis for the bill is simple, seductive, almost nostalgic. It may be thus correctly summarized: "Competition between employers is the principal regulating mechanism of the American economy. Commercial competition insures to the public more goods at lower prices. Wages paid to employees constitute the largest single item in the cost of manufactured goods. Strong unions compel payment of uniformly higher wages which, in turn, compel higher prices which the public must bear. These undesirable social effects of union power must therefore be minimized by statutory restrictions. In the public interest, multi-employer bargaining, a maximum manifestation of abusive union power, must be outlawed as a 'monopolistic' labor activity. The law must restrict union representation to employment units generally not greater than that of a single employer. The prohibitions of the Sherman Act should be applied to deprive national labor organizations of power to exert common control or approval over the collective bargaining of their affiliated local unions or subdivisions."[3]

In support of the bill Mr. Iserman is without restraint in his claims or his rhetoric. Even the unaffiliated local union which has been designated in an NLRB election by a majority of the employees in a bargaining unit, he insists, enjoys "compulsory monopoly, enforced by law" because "the law forbids the employer to deal with anyone other than that union".

Gwinn-Fisher Is Return to the Common Law

How far, if at all, do the Gwinn-Fisher Bill and Mr. Iserman's arguments in support thereof represent an advance from the common-law treatment of labor organizations? If there is any difference, it is only one of degree. At common law and in early American jurisprudence, the mere combination of workers into a union was prohibited as a criminal conspiracy.[4] Under the Gwinn-Fisher Bill, labor organizations would be impotent societies, whose actions

1. Sources of economic data used herein and many pertinent observations were furnished by colleagues and friends, whose valuable contributions to this paper ought not go unremarked. They are my partner, Joseph M. Jacobs, of Chicago; Otto Mullinax, L. N. D. Wells, Jr. and William Kimbrough, of Dallas; Chris Dixie, of Houston; Emil Schlesinger, Morris P. Glushien and William Gomberg, of New York City; Dr. Charles Anrod, Dr. Roland I. Robinson and Malcolm S. Kamin, of Evanston, Illinois; S. P. Ming and H. A. Schneider, of Minneapolis; J. A. Leveridge and Clif Langsdale, of Kansas City; Bert Seidman, George W. Christensen, Robert Kaplan, Vernon Jirakowic, Arthur J. Goldberg and Herbert S. Thatcher, of Washington, D. C.

2. John Maynard Keynes, quoted by Galbraith, *American Capitalism: The Concept of Countervailing Power*, page 11 (Houghton Mifflin Company, Boston, 1952).

3. Cf. William J. Grede, President, National Association of Manufacturers, statement before House Committee on Education and Labor, May 14, 1952: "Either the nation will have a free competitive enterprise system or we will have industry-wide bargaining, with the power of government invoked to fix the terms of wages, hours and working conditions, and the right to strike abolished. . . . Because collective bargaining is most fruitful when conducted at the individual plant or company level, we urge that this principle be enacted into national labor policy."

4. Cf. Gregory, *Labor and the Law*, Chapter I (W. W. Norton & Company, Inc., New York, 1946). Teller, *Labor Disputes and Collective Bargaining*, Volume 1, pages 59-66 (Baker, Voorhis & Co., New York, 1940). "Every man may work at any price he pleases, but a combination not to work under certain prices is an indictable offense." Lord Mansfield, *Rex v. Eccles*, 1 Leach C.L. 274, 168 Eng. Rep. 240 (1783), quoted by Teller, *op. cit.*, Volume 1, pages 60-61. "A combination of workmen to raise their wages may be considered in a two-fold point of view: one is to benefit themselves . . . the other is to injure those who do not join their society. The rule of law condemns both. If the rule be clear, we are bound to conform to it even though we do not comprehend the principle upon which it is founded." Recorder Levy in *Commonwealth v. Pullis* (1806) the Philadelphia Cordwainers' case. Quoted by Gregory, *op. cit.* page 24. See Nelles, "First American Labor Case", 41 Yale L. Jour. 165 (1931).

must be always scrutinized for evidence of "conspiratorial" extensions of concerted activity or mutual aid beyond the statutory limits.

The common-law doctrine of criminal conspiracy of labor combination was essentially an expression of the views of English judges that union objectives were "unlawful because they interfered with the 'natural' operations of basic principles of economics—the sanctions of the market".[5]

The notion of atomistic competition embodied in these common-law holdings and enunciated by such classical economists as Smith, Malthus, Bentham, Mill and Ricardo has been abandoned and repudiated by responsible (and, it must be added, conservative) economists, by American courts and by state and federal legislatures. It has been long recognized that neither laws nor lawmakers can force the application of commodity-market concepts to the establishment of rates of pay for personal services.

As this article will show, the American economy is characterized by the widespread disappearance of competition in its classical form, and its replacement by small groups of large firms in most of the principal industries engaging in at least conventional or tacit collusion.[6] "In 1947 the 113 largest manufacturing corporations, with assets in excess of $100,000,000 each, owned . . . 46 percent of the total [net capital assets—property, plant and equipment] for all manufacturing, both corporate and non-corporate."[7]

Yet one may assume that the American economy is as competitive as the Sherman Act states it ought to be and make out a vigorous case against the application of concepts of commodity competition to the fixing of labor rates.

Labor markets differ greatly from commodity markets. In the absence of collective bargaining, only the purchasers (employers) quote the wage or price. Labor lacks the mobility of commodities and cannot freely move to the "market" where the highest rates are offered. Wage rates cannot have the fluidity or flexibility of commodity prices, with frequent upward and downward movements and changes.

Reputable economists also point out that unions do not "sell" labor. They are not profit-making institutions. They are as much social and political organizations as they are economic bodies.[8]

Competition through wage-cutting is as destructive of management interests as it is of labor interests. Low-wage, sweatshop conditions thrust great burdens upon the tax-paying public by creating the need for a host of social services to fill dire want in large sections of the community. It has been pointed out that the public interest is much broader than the lowest possible price for consumers' goods. The purpose of all economic activity is human welfare. This is not measured alone by the market price of commodities.[9] The Gwinn-Fisher Bill denies that workers are a part of the public, and, in our representative government, are numbered among its citizens and rulers.[10]

Where competition between employers of labor is a primary force in our economic order (and it is here freely admitted that in some industries it is), it may be achieved without unduly burdening the labor force with low wages or demand for output at levels which tax human endurance beyond reason. There is ample room for competition among employers in better methods of supervision of labor, improved production planning, more scientific use of machinery, marketing, salesmanship, advertising and building up of brand names, and in the exercise of other management functions.[11]

Gwinn - Fisher Bill Is Not Justified

Mr. Iserman's easy phrases, "labor monopoly" and "labor monopolists", are political slogans which cannot be documented and do not justify reshaping the American economy to conform to the blueprint of the Gwinn-Fisher Bill.

The Congress in 1947 rejected a less radical proposal when it was considering the bills which were merged into the Taft-Hartley Act. When the Ball Bill[12] to curtail multiemployer bargaining was under consideration, many employers and other witnesses, unconnected with organized labor, expressed opposi-

5. Gregory, *op. cit.*, page 19.

6. Galbraith, *op. cit.*, page 118.

7. *Report of Federal Trade Commission on the Concentration of Productive Facilities, 1947. Total Manufacturing and 26 Selected Industries*, page 14, U. S. Government Printing Office, Washington, 1950.

8. Lester, "Reflections on the 'Labor Monopoly' Issue," *Journal of Political Economy*, Volume LV, No. 6, December, 1947.

9. Clothing manufacture is often cited by economists as an example of an industry lacking monopolistic or oligopolistic characteristics—one which more nearly pursues the pattern of atomistic competition advocated by Adam Smith. A graphic and brilliant dissertation on the consequences of uninhibited competition in the women's garment industry is published under the prosaic title, *The Outside System of Production in the Women's Garment Industry in the New York Market*. International Ladies' Garment Workers Union, New York, 1951.

"A price is a reflection of a host of social arrangements. . . . There is evidently more to a 'right price' than the negative demand that no one shall take undue toll at any point. . . . [What] of a price that fails to carry the full cost of maintaining the workers? That such prices have existed for many commodities over long periods of time cannot be denied. . . . Wages which mean bad living conditions, undernourishment, and overstrain may be partially translated into community costs of increased medical care and relief, but to a large extent they are borne by the workers whose loss of stamina and vitality is transmitted to future generations—an economic loss whose incidence never finds its way into our ledgers, nor comes readily into the reckoning of what a dress is worth. . . . There is no crisp rightness about a market price. It turns an innocent face to the world and hides the fact that necessitous men must take what they can get. The theory that market prices work out for the good of all—provided competition be free—assumes a complete fluidity of labor and managerial talent which, when denied a proper living, moves with uncanny accuracy into a sunnier financial climate. Such a theory refuses to recognize that over long periods of time the consumer may profit unduly at the expense of those who carry on the business. It fails to understand that price is a 'political' as well as an economic phenomenon." Meiklejohn, "Dresses—The Impact of Fashion on a Business", from Hamilton and Associates, *Prices and Price Policies*, pages 300, 351 (McGraw Hill Book Company, New York and London, 1936). See also testimony of Jacob Potofsky, Hearings before Committee on Labor and Public Welfare, U. S. Senate, 80th Cong., 1st Sess. on S. 55 and S. J. Res. 22, Pt. 3, pages 1573-1583.

10. *Cf.* Witte, "Economic Aspects of Industry-Wide Collective Bargaining—An Institutional Approach". *Proceedings of the Conference on Industry-Wide Collective Bargaining*, May 14, 1948, pages 21-34 (University of Pennsylvania Press, Philadelphia, 1949).

11. *Cf.* Pollak, *Social Implications of Industry-Wide Bargaining*, Chapter II, University of Pennsylvania Press, Philadelphia, 1948).

12. S. 133, 80th Cong. 1st Sess.

tion.[13] Undoubtedly this opposition was responsible for defeat of the Ball amendment.[14]

Reliable studies on multiemployer bargaining were admittedly scant before the 80th Congress undertook to legislate significant changes in national labor policy.

The Taft-Hartley Act, in one of its now-forgotten sections, specified that a Joint Committee on Labor-Management Relations, consisting of members of the House and Senate, should study "the methods and procedures for best carrying out the collective bargaining processes, with special attention to the effects of industry-wide or regional bargaining upon the national economy".[15]

Senator Ball, as Chairman of the Joint Committee, transmitted to the Senate in the last days of his term in that chamber, a report on the West Coast maritime industry which is most revealing.[16]

Senator Ball's Committee compared labor-management relations in the maritime industry with those of other West Coast industries and concluded that "multi-employer bargaining has, in different industries, been both an instrument of peace and of war. In some contexts and in some environments, it has been conducive to the preservation of industrial peace, while in other instances the opposite result has been produced. The conclusion seems inevitable that it is not multiemployer bargaining *per se* which has produced either result."[17]

An authoritative literature on the subject of multiemployer bargaining commences with the effective pioneering undertaken by the Labor Relations Council of the Wharton School of Finance and Commerce. A series of fifteen publications, prepared under the guidance of George W. Taylor, is now available.[18] No one who has read these monographs and compilations could any longer indulge in blanket invective against "labor monopoly" and "labor monopolists".

"Throughout this series of reports the reader is warned against oversimplification. Both within and among industries, the types of multiemployer bargaining are distinctly different, and they have very different economic effects, which are in part responsible for current conflicting opinions of industry-wide bargaining. (The term 'industry-wide' bargaining is itself a misnomer.) Consequently, it is meaningless to speak of the economic results of multi-employer bargaining as a whole. Contrary to general belief, it is shown that the uniformity of behavior supposed to characterize monopolistic or collusive action may result as much from industry-wide unionization, or from the practice of the 'follow-the-leader' policy among employers, as from industry-wide bargaining".[19]

To assert that the law of the land should not curtail multiemployer bargaining is not to advocate that such bargaining must be encouraged or extended by law.[20] Labor organi-

Alfred Kamin has been a member of the Bar of Illinois since 1932. He received his legal training at Chicago-Kent College of Law. He was counsel for the United Mine Workers of America, first at Springfield, Illinois, and then at Washington, D. C., from 1940 to 1944. He has been General Counsel for the American Federation of Grain Millers, A. F. of L., since 1947. He is a member of a Chicago firm which represents international and local unions affiliated with the American Federation of Labor. He is Vice Chairman of the Section of Labor Relations Law of the American Bar Association, and served as Chairman of the Labor Law Section of the Illinois State Bar Association from 1949 to 1951.

13. Hearings before Committee on Labor and Public Welfare, U. S. Senate, 80th Cong., 1st Sess. on S. 55 and S. J. Res. 22 (1947); Ludwig Teller, pages 256-258; Vincent P. Ahearn, Executive Secretary, National Sand and Gravel Association, pages 506-507; Harold Stassen, pages 579-585; Almon E. Roth, President, National Federation of American Shipping, Inc., pages 623-626, 635-638; Earl F. Reed, employers' attorney, Pittsburgh, pages 743-744; clothing manufacturers quoted, pages 1577-1578; Paul M. Herzog, pages 1932- 1933; Richard A. Lester, Associate Professor of Economics, Princeton University, pages 2243-2248; David A. McCabe, Professor of Economics, Princeton University, pages 2251-2252; Reymond H. Reiss, President, Clothing Manufacturers Association of U. S. A., pages 2320-2321. Also W. J. Lawrence, Executive Secretary, Flour, Feed and Cereal Employers Association, Cong. Rec., same Cong. and Sess., pages 5071-5073.

14. Cong. Rec. Senate, May 7, 1947, page 4803.

15. Public Law 101, 80th Cong. Ch. 120, 1st Sess. (61 Stat. 136) §402.

16. 80th Cong., 2d Sess. Report 986, Part 5, December 31, 1948. In an earlier report, the Committee stated "There are few pure examples in American industry of collective bargaining conducted on an industry-wide scale. A more accurate term to describe the type of bargaining the Committee is studying is multi-employer bargaining, viz: collective bargaining between a union and a group or groups of employers." Report 986, page 46, March 15, 1948.

17. *Ibid.*, Part 5, page 65.

18. There are thirteen monographs, a report of Conference Proceedings, and an annotated bibliography in the *Industry-Wide Collective Bargaining Series*, edited by George W. Taylor, published by University of Pennsylvania Press, 1948 and 1949. The monographs are as follows:

Tilove, *Collective Bargaining in the Steel Industry*,
Friedin, *The Taft-Hartley Act and Multi-Employer Bargaining*,
Pollak, *Social Implications of Industry-Wide Bargaining*,
Bahrs, *The San Francisco Employers' Council*,
Kerr and Randall, *Collective Bargaining in the Pacific Coast Pulp and Paper Industry*,
Pierson, *Multi-Employer Bargaining: Nature and Scope*,
Fisher, *Collective Bargaining in the Bituminous Coal Industry*,
Feinsinger, *Collective Bargaining in the Trucking Industry*,
Kennedy, *The Significance of Wage Uniformity*,
Garrett and Tripp, *Management Problems Implicit in Multi-Employer Bargaining*,
Seybold, *The Philadelphia Printing Industry: A Case Study*,
Abersold, *Problems of Hourly Rate Uniformity*,
Levy, *Multi-Employer Bargaining and the Anti-Trust Laws*.

The annotated bibliography compiled by Selma P. Kessler lists 177 separate references, all dated 1947 and prior years.

19. *Monthly Labor Review*, U.S. Dept. of Labor, Volume 68, No. 6, page 659, June, 1949.

20. *Cf. Reports of U.S. Commission To Study Industrial Relations in Great Britain and of U. S. Commission To Study Industrial Relations in Sweden* (U. S. Dept. of Labor, Washington, 1938); *Wages under National and Regional Collective Bargaining*, Appendix A, Industrial Relations Section, Princeton University (1946).

zations themselves are by no means agreed upon what is the most effective bargaining pattern.[21] There is no factual basis for Mr. Iserman's declaration that every international union in the country dominates and dictates to every affiliated local union and specifies the form and content of every labor agreement.

Even when the multiplant or multiemployer pattern is used, uniform labor terms and conditions do not necessarily follow. Important areas of action and decision are reserved for disposition through locally negotiated arrangements.[22]

Sincere advocacy of the Gwinn-Fisher Bill must presuppose contemporary fulfillment in industry at large of the objectives of the Sherman Act. Has the Act actually afforded protection to the public by holding the American economy to the competitive model? Is competition today the principal self-regulatory force over original market power? Do there exist in the economy significant areas of free competition with highly individualistic labor markets?

Sherman Act Objectives Have Not Been Realized

The objectives of the Sherman Act appear never to have been realized. In the principal industries of the nation the dominant unit is the large corporation, producing for national and international markets. Primary market power is in the hands of a few leading companies. Oligopoly or cryptomonopoly more accurately characterizes most of the American economy than the competitive model visualized by the classical economists and prayed for in the Sherman Anti-trust Act.[23]

Labor unions usually do not create power patterns to which employers must conform. It is just the other way around. "In the ultimate sense it was the power of the steel industry, not the organizing abilities of John L. Lewis and Philip Murray, that brought the United Steel Workers into being."[24]

The footnotes contain references to "American Capitalism: The Theory of Countervailing Power", by John Kenneth Galbraith. This is the most provocative economic treatise to have come my way in many years. Space forbids more than the briefest reference to it. Galbraith's sober analysis of our current economic order makes hash of a proposal to reshape it in the image of the Gwinn-Fisher Bill.

Galbraith points out: "Competition, which, at least since the time of Adam Smith, has been viewed as the autonomous regulator of economic activity and as the only available regulatory mechanism apart from the state has, in fact, been superseded."[25] New restraints on private power, he declares, have appeared to replace competition. These restraints appear not on the same side of the market, but on the opposite side. It is not the restraint of the competitor who supplies a similar or substitute product or service, but rather the restraint of the customer or supplier. (For example, the power of a great retail organization like Sears, Roebuck may cause more effective pressure in reducing the price of "A" brand tires than action of the competing manufacturer of "B" brand tires.) These restraints which are the counterpart of competition, Galbraith calls "countervailing power".

The author asserts:[26]

> The operation of countervailing power is to be seen with the greatest clarity in the labor market where it is also most fully developed. Because of his comparative immobility, the worker has long been highly vulnerable to private economic power. The customer of any particular steel mill, at the turn of the century, could always take himself elsewhere if he felt he was being overcharged. Or he could exercise his sovereign privilege of not buying steel at all. The worker had no comparable freedom if he felt he was being underpaid. Normally he could not move and he had to have work. Not often has the power of one man over another been used more callously than in the American labor market after the rise of the large corporation. As late as the early twenties, the steel industry worked a twelve-hour day and seventy-two-hour week with an incredible twenty-four-hour stint every fortnight when the shift changed.
>
> No such power is exercised today and for the reason that its earlier exercise stimulated the counteraction that brought it to an end. . . .
>
> As a general though not invariable rule there are strong unions in the United States only where markets are served by strong corporations. . . . Not only has the strength of the corporations in these industries made it necessary for workers to develop the protection of countervailing power, it has provided unions with the opportunity for getting something more as well. If successful they could share in the fruits of the corporation's market power.

There is no national need for a Gwinn-Fisher Bill or any counterpart. The need is for more informed thought on the problems of labor-management relations and for more enlightened techniques in collective bargaining.

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21. "Multi-employer bargaining situations are probably most numerous on a local basis in non-manufacturing industries", Garrett and Tripp, *op. cit.*, page 4. Also *Monthly Labor Review*, U. S. Dept. of Labor, Volume 71, No. 6 pages 695-697, December, 1950.

22. "The multi-employer bargaining may relate only to the negotiation of a master agreement covering some of the more general conditions of employment, leaving wages and other conditions to be determined locally." Witte, *op. cit.* page 23.

23. Galbraith, *op. cit.*, Chapter IV; *Report of Federal Trade Commission on the Concentration of Productive Facilities, 1947. Total Manufacturing and 26 Selected Industries*, United States Government Printing Office, Washington, 1950.

24. Galbraith, *op. cit.*, page 121. Jesse Friedin does not fully agree. "The notion that the power of big unions would be effectively limited were collective bargaining to be conducted on the single-plant or local area level has a deceptive simplicity and may stem from a possible mistaken juxtaposition of cause and effect. The assumption that group-employer bargaining is responsible for the bigness and power of unions appears contrary to experience. The fact seems to be that the formation of employer organization is, in large part, a defensive response to the organized and established power of large unions. And it appears very likely that to outlaw group-employer bargaining would simply have the effect of depriving employers of a mechanism they have found effective in the bigness of unions, without in any substantial way reducing the power to shut down an industry implicit in such bigness." *Op. cit.*, pages 4-5. There is some validity to this observation in certain local market industries which more nearly approximate levels of atomistic competition. *Cf.* Carpenter, *Employers' Associations and Collective Bargaining in New York City* (Cornell University Press, Ithaca, N. Y. 1950). But it would not be apposite to oligopolistic industries producing for national and international markets.

25. Galbraith, *op. cit.* page 119.

26. *Ibid.*, pages 121-122.

Books for Lawyers

HOW TO KEEP OUR LIBERTY. *By Raymond Moley. New York: Alfred A. Knopf. 1952. $4.00. Pages 336.*

The book is a continuation, one might say an amplification, of *After Seven Years* by Mr. Moley, released in 1939. This was shortly after his withdrawal from the inner circle of the New Deal. The brand name "New Deal" was designed by Moley, as was the famous "forgotten man" term. After the election of Franklin D. Roosevelt to the Presidency, Moley accompanied him to Washington and during the famous 100 days of history-making legislation acted as liaison between the President and Congress in the formulation and passage of much of this legislation.

The appraisal of a book involves a consideration of the author. The convincing power of an argument is bound up in the personality behind it. Mr. Moley is a commentator. He also has the advantages of a ripe experience as a college professor and, from the standpoint of the book he has created, certain disadvantages too. From his training as a teacher and experience as a news commentator, neither objectivity nor practicality would be expected to come easy.

The book is an important contribution toward a better understanding of the confusion of the times. Not because it reveals any new discoveries or settles a major argument for anyone. But the approach is orderly and at times the perception and analysis keen with insight. The dragon of the piece is "statism". "The concentration of all economic controls and planning in the hands of a highly centralized state government." The treatment is broken down into five major departments of discussion.

In Part One the professor takes over. The mode and manner is dogmatic and savors of the classroom. The basic principles of constitutional government are stated with clarity and force. But he considers that the safeguards which have been erected for their preservation are today "confronted with formidable and dangerous threats".

In Part Two the author begins to develop his ground for concern that "statism" is in the act of destroying our democracy. His prescription for determining our future course is largely the attainment of *economic* liberty.

Part Three is a lucid analysis of processes which his examination finds at work. The great and dominant group in America consists of those having middle interests. These are they for whom the expression "the forgotten man" was originally coined. He deplores appeals to class groups at points where their interests are competitive. These appeals are divisive, whereas appeals to the middle groups tend to unite them. He finds that a very marked progressive change-over is occurring among wage earners as to their political sympathies and outlook because of the economic progress they are making. They cannot be counted on to vote as a labor group without regard for other considerations. The intelligence of the well paid and stockholding employee will no longer accept the old chestnuts about bloated executives and starving workers. His tables illustrate and prove the statements which he makes about the "vanishing rich". We have travelled about two-thirds of the way to absolute income equality since 1929. The income interests of those previously classified as rich have sunk to the middle, while those of the workers have risen to that level. Meanwhile gifts and contributions to various cultural and scientific institutions have fallen away or dried up.

The author does not comment upon the desirability of these fundamental changes, but the assumption is that he regards them as a part of the growth of "statism" and so is opposed to them. In so far as these effects are the results of the taxing policies of the Government, his disapproval is not left in doubt. Taxation should be prompted by the needs for revenue and not utilized for social control. He complains that the Supreme Court appears to consider the rights of "life, liberty and property" in descending importance. "The Declaration of Human Rights by the United Nations goes a step further", he believes. There follows a comprehensive arraignment of our current economic, political and governmental policies.

Civil rights should be approached as a regional, rather than a federal, problem. The TVA, Columbia and Missouri Valley proposals are perversions of President Hoover's sound idea which produced the Boulder Dam. In order to effect a restoration of balance between the tax policies and practices of the Federal Government and the states, there should be a fresh start in allocation of the sources of taxation. The principle of "government medicine" is condemned and a good argument advanced for voluntary health insurance and other privately organized plans. Social security and government-aid plans of the various sorts now in operation are shown to be wasteful and unequal. In no circumstances should any one receive a pension except on the basis of need. The weaknesses in industrial pensions now exacted under collective bargaining are a despair. "Experience alone must be the savior there." The accumulation of powers and functions in the Federal Government is deplored and activities which, in the aggregate, now cost the Federal Government about ten billion dollars per year should somehow be

relinquished to the jurisdiction and purview of the states. "Out of bondage, and off the dole" is a striking and appealing phrase by which this policy is presented. Regulation of business without regimentation comes in for its share of approval, as does more justice in the management of industrial relations. Finally he wants a balanced federal budget and a sales tax.

There can be no doubt that some of these objections to present practices and policies are valid. Most of them are being condemned from one end of the land to the other in bursts of patriotic ebullience by other men and women who are willing to make the sacrifices involved in taking over the offices and assuming the task of redemption of the country. But there is this difference: Mr. Moley offers thoughtful, if at times slightly impracticable, programs for change and improvement.

In Part Four he finds that the two-party system, which he approves, does not in fact exist. In the first place, the South does not enjoy a two-party plan of elections and never has done so. The northern Democratic leaders have seized power by various devices, chiefly through arranging benefits to widely different groups so as to weld them together into a federal machine which bears only superficial resemblance to a political party in the accepted sense. "In five short years", he exclaims, "this man (Truman) has managed and directed the most potent federal political machine in our history." There follows a program for individual and group action which, if attainable, would undoubtedly go far toward achieving those changes and improvements which the author so earnestly advocates. Here the professor rides again. He allocates tasks to citizen groups, advertising men, businessmen, doctors, lawyers, women, teachers, farm leaders and wage earners which are chiefly paper plans and (men and women being as they are) may not be possible of achievement.

Finally, in Part Five, the author gathers up the dangling ends and ties the knot of his logic. The contrasts of the Marxian Iron Curtain country system and of British socialism with liberty as we know it, are sharply drawn. The economic system of America has come to mean that Americans are nine times better off than the average of the world's population. "The distribution of these and other indices of living standards are on an incomparably wider basis than elsewhere." Despite these facts the book seems to be saying that we are lost unless we stop the present trends and change back to the ways of other days. Statism, as Mr. Moley understands and fears it, involves progress of those forms of authority which tend to become paramount over the individual. His own passage from the New Deal philosophy of the 1930's to the present position appears to be complete.

The positions seem to be inconsistent with each other, but this may be so only in a superficial sense. In another aspect the attitude of Mr. Moley is consistent. At both times he has been in opposition. In the year 1932 his opposition was wholehearted, determined, brilliant. The position in 1952 is still opposed—to quite different things to be sure—but the opposition is no less confident, engaging, instructive.

JACOB M. LASHLY

St. Louis, Missouri

THE COURT AND THE CONSTITUTION. *By Owen J. Roberts. Cambridge, Massachusetts: Harvard University Press. 1951. $2.00. Pages 102.*

Adequately to review this book would take more than the 102 pages of the book itself. Intelligently to discuss it would take more knowledge than any reviewer, not himself a Justice of the Court or an expert on constitutional law, could acquire without a careful study of the more than 300 Supreme Court decisions, which are cited by Mr. Justice Roberts.

In these three lectures delivered at Harvard Law School on the foundation bequeathed by Justice Oliver Wendell Holmes, the scholarly jurist discusses the growth of federal power in three categories—taxation, police power and the Fourteenth Amendment, where federal and state jurisdictions overlap.

The book satisfies the first tenet of literary criticism. His effort is well worthwhile. As to the second tenet —how does he go about it? It is obvious that he must have carefully studied every Supreme Court case on these three topics. One gets the definite impression that he did not depend on headnotes or abstracts prepared by assistants, but read and annotated every case himself.

He premises that the framers of the Constitution consciously created:

> A dual form of government which had no parallel in political history;

and that:

> They proposed to establish a National Government separate from and superior to the constituent states in the matters committed to it, but they meant that in all matters not committed, the states were to retain the attributes of sovereignty.

In distributing the fundamental power of taxation the Constitution limited the power of the state to get revenue by taxation in only two respects (customs and tonnage dues); and gave the Congress the almost unlimited power to tax. The Congress was prohibited only from levying export taxes, must make taxes uniform throughout the country and must proportion direct taxes by population. That was all. Thus almost the entire field of taxation was left open to both governments; the burden necessarily to fall ultimately on the same persons, corporations, property, privileges and activities.

With these premises to start with and visualizing state and national governments each as a sovereign, the Court has eventually arrived at these conclusions: neither sovereign can tax the property or the obligations of the other, or the interest payments that the other pays; economic burden is probably not banned as the test of the invalidity of a tax by one sovereignty on a governmental agency of the other, although the directness of tax is sometimes the practical test; private interests deal-

ing with one of the sovereigns may probably be taxed by the other on profits in transactions at least where there is no discrimination against the taxed person. But the Court has not yet settled whether a business operation conducted by one sovereign may be taxed by the other, and whether the Congress can immunize from state taxation activities which the state has the prima facie power to tax. Because it would "make a mockery of state sovereignty", Mr. Justice Roberts disagrees with the opinion of one of the Justices that the Congress does have this power.

He believes that Chief Justice Marshall may have been wrong when he said that exercise of the overlapping power to tax depends on the innate power of the sovereignty rather than on the "confidence" of the one in the good purposes of the other.

In his second chapter the author concludes that the police power which the states possessed in 1787 has been circumscribed by the Court, as a result of its approval of the tendency of the Congress to stretch its granted powers. He suggests that the states have been reduced almost to administrative districts in their exercise of police powers in any subject on which the Congress has decided to act.

This development he traces through the commerce decisions of the Court. The police power of the states is now left unhampered only in those wholly local matters where the Congress has not stepped into the picture and there is no likelihood of its doing so. In matters broader than local that are or may be of interest to the Congress, as well as in cases where the Congress has actually taken over jurisdiction, the state must retire. Even when the Congress has remained inactive the states act at their peril. The Court may say that state statutes or decisions hamper an activity which the Congress might want to take over.

The high-water mark of a once-developing doctrine that the Congress cannot regulate local activities was reached in 1936 in the *Carter* case, 298 U. S. 238, where the Court invalidated the reduction of an excise tax on those purchasers of coal who entered into price-fixing agreements and conformed to certain labor policies. Two years later the case was overruled and the National Labor Relations Act was sustained, ostensibly because the Congress spelled out in it the relation of the act to interstate commerce. A flock of New Deal statutes using the same technique were immediately enacted and approved by the Court.

To limit the congressional power thus approved has been difficult, and as it stands:

> It is hard to think of any local business which Congress may not regulate if it professes to believe that the operations of that business may be detrimental, in however slight or remote a degree, to interstate commerce.

The author concludes that:

> Ingenuity can probably bring forth some form of excise, such as that in the Social Security Act, that will make it very expensive to live in a state which does not enter the federal aid system.

But he takes some comfort in the observation that:

> An insistence by the Court on holding federal power to what seemed its appropriate orbit when the Constitution as adopted might have resulted in even more radical changes in our dual structure.

And further he says:

> Doubtless extreme cases will in the future, as they have in the past, call for an exertion of the Court's ultimate authority.

In his third chapter Mr. Justice Roberts analyzes the Fourteenth Amendment in relation to the first eight amendments to the Constitution. These eight amendments were originally conceived as limiting only the Federal Government, but the Court has now hooked them into the Fourteenth Amendment and seems to be setting them up as fundamental personal rights and liberties, protected by the Fourteenth Amendment against state as well as federal encroachment. He characterizes *Adamson* v. *California*, 332 U. S. 46 (1947), as:

> The most sweeping judicial extension of federal power over state action in the history of the republic.

This case extended the protection of the Fourteenth Amendment to the provisions of the First Amendment.

His final conclusion is that:

> Progressively, the Supreme Court has limited and surrendered the role the Constitution was intended to confer on it.
>
> * * *
>
> Doctrines announced as corollaries to express grants of power to the Congress have more and more circumscribed the pristine powers of the states, which were intended to be reserved to them by the Constitution.

How well does he do the job he set out to do? The reviewer ardently wishes that it were possible to check this with one of Mr. Justice Roberts' former colleagues or present successors. They might differ with the distinguished author in his conclusions, but it is safe to say that nobody can quarrel with the logic of his reasoning or the accuracy of his statement of the decisions on which he bases his conclusions.

And certainly his cogent and closely reasoned disquisition is well worth the attention of any reader who is or would like to be a constitutional lawyer.

CLEMENT F. ROBINSON
Brunswick, Maine

CASES AND OTHER MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION. *By Arthur T. Vanderbilt. New York: Washington Square Publishing Corporation. 1952. $8.50. Pages 1400.*

When in 1906, Roscoe Pound delivered his now famous commentary on "The Causes of Popular Dissatisfaction with the Administration of Justice", Professor Wigmore records that the assembled members of the American Bar Association "sat in dumb dismay and hostile horror at the deliverance of the daring iconoclast". Only one "reformer" arose to praise, said Professor Wigmore, and the most he could get from the incensed assembly was a decent burial by reference to a committee. In an address to the same assembly in 1937, Professor Wigmore referred to

Pound's 1906 utterances as "the spark that kindled the white flame of progress". These two legal classics appear as Chapters Two and Three in Mr. Chief Justice Vanderbilt's new casebook on modern procedure. And, in his introduction, he sets the tenor and theme of his casebook with the statement that if he had his way about it, they would be required reading for every lawyer, as well as every law student.

With the zeal of an advocate, the curiosity of a teacher, and the temperance of a judge, the great Chief Justice traces with a sure and vivid hand the struggle of our profession to rid itself of procedural shackles, culminating in the adoption in 1938 of the Federal Rules of Civil Procedure. He acclaims the advent of these eighty-six simple and concise rules as based upon the fundamental premise "that a trial is an orderly search for the truth in the interest of justice rather than a contest between two legal gladiators with surprise and technicalities as their chief weapons. . . ."

He refers to the contemporaneous reports of the Committees of the Section of Judicial Administration on administration, pretrial procedure, trial practice, trial by jury, law of evidence, simplification and improvement of appellate practice and administrative agencies and tribunals. He tells how these reports, by committees composed of the best legal minds in the country, laid out a pattern for the improvement of the administration of justice under the new Rules. And, he points with professional pride to the wide acceptance of these Rules by various states, including his own New Jersey. He also alludes to the more recent *Minimum Standards of Judicial Administration* as establishing the norm for the administration of justice.

But what he could not tell his young readers, that seems important to an appraisal of his casebook on modern procedure, is that probably no other individual did more to secure the adoption and acceptance of the new procedural Rules. As President of the American Bar Association in 1938, when they were adopted, he encouraged Judge John J. Parker to appoint the seven committees, and their reports were made the first order of business when the Association convened in the fall. In a foreword to the reports of the committees, he bade the judge, the lawyer and the law school professors to band themselves together and direct their training and experience toward a common objective. It was then that he said: "We have all too often forgotten . . . that it is the delays in procedure, the technicalities of pleading, and the complexities of practice that have aroused the ire of our clients much more frequently than the actual decisions of the courts on the merits of the cases submitted to them."

Through the force of his own dynamic personality and the strength of his character, the author has revolutionized the judicial system in his own state. As Chief Justice and administrative head of this new system, under rules patterned after the Federal Rules, he has set a new standard for efficiency in the administration of justice. Not only that, he mobilized the Junior Bar of the country to compile and publish *Minimum Standards of Judicial Administration*. All of this is enough to make his name revered in the hearts of all those who love justice. But Mr. Justice Vanderbilt is not content with the mere promulgation of a set of rules and sage sayings about their efficiency; he is determined that they shall be construed to secure the just, speedy and inexpensive determination of every civil action. Mindful of the extreme reluctance of the Bench and Bar to accept anything new or different in the procedural field, Chief Justice Vanderbilt has now turned his attention to the receptive minds of the law teacher and the law student. Thus, in the introduction to his casebook, he said: "It is to the law schools, therefore, that we must look for the systematic development of procedure in the future, even though it must be admitted that in the past they have not often lived up to their responsibilities in this field. . . . If legal education is not to continue to be surpassed by medical and engineering education, it must deal increasingly with the How (legal skills) and the Whither (what the law should be if the law is best to serve society)."

The case material is geared to the Federal Rules of Civil and Criminal Procedure and to those patterned after them, but the book is no superficial presentation of the workings of the federal system or of systems patterned thereafter. It deals with the work-a-day problems confronting every lawyer in and out of the courtroom and proceeds by cases to develop the problem and find the answer. Ten chapters of the casebook are devoted to ten major problems in procedure. The first subject is of course jurisdiction—the power of the court to hear and determine; (2) parties, that is, who may bring the suit and who may be sued; (3) venue, where may suit be brought or transferred; (4) process, such as summons, arrest or attachment—in other words, how may the plaintiff bring the defendant or defendants into court; (5) remedies, that is, what relief is sought; (6) how to state the controversy—the pleadings; (7) how to prepare for trial—pretrial procedures; (8) the trial—how to litigate the controversy; (9) review of the trial court of its own proceedings, amending, opening and vacating the judgment; and (10) enforcement of a judgment.

Chapter VIII on pleadings states only enough of common law to emphasize the difference between the so-called fact pleadings under the common law and notice pleadings under the new Rules. The selected cases establish the rule of simplicity of modern pleadings, under which the general claim is stated and the issues developed with the proof. The cases also deal with the sufficiency of indictments under the Federal Rules of Criminal Procedure, the salient requirement of which is that the defendant shall be advised of the charge against him so that he may prepare his defense and be protected against double jeopardy.

But the Chief Justice does not stop

(Continued on page 788)

AMERICAN BAR ASSOCIATION

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EDITORIAL OFFICE

1140 North Dearborn Street.....Chicago 10, Ill.

■ *Olive G. Ricker*

The flight of Time is inexorable in the changes it brings. It leaves gaps in our ranks not to be filled. One such we must face on the day when the forthcoming Annual Meeting closes in San Francisco; for on that date Olive Ricker, by her own choice, retires from office as Executive Secretary of the American Bar Association. Her retirement closes a brilliant chapter in the story of the Association.

For over twenty-eight years—since January 31, 1924, to be exact—Mrs. Ricker has devoted her shining talents, without reservation, to the best interests of the Association. She has been single-minded in her loyal devotion to that great organization. What she has contributed has been offered with never a thought for herself. She has recognized no limit to her hours at her desk. Her days have been long and arduous, her vacations few and far between.

No one has had a clearer grasp of our problems; no one has known the membership better nor considered its anxieties with more sympathy and understanding.

In the discharge of her duties, in all her dealings with those concerned with the affairs of the Association, she has demonstrated fine intellect, quick grasp of essentials, sound judgment and tireless energy.

Ever forthright and outspoken, she has exhibited unflinching courage, steadfast integrity and unshakable fidelity to lofty principle and high ideal.

By her warmth of character, her willingness to speak out and stand fast and her unselfish will to understand and lend a hand to those about her, she has endeared herself to many who are proud to be allowed to count themselves among her friends. In their hearts, her place will remain secure. Her response to every reasonable request for advice or help has been ready and glad; for her heart is great and warm and she has asked only that no word be spoken of what she has done and that her myriad kindnesses pass unnoted.

The members of her staff have always entertained for her sincere affection. To her they have brought their troubles and their confidence has never been disappointed. She has watched over them as though they were her own.

For what Olive Ricker has done for our Association, for the organized Bar, for the more effective administration of justice and for hundreds of members who so gladly render homage, our gratitude and admiration are boundless.

May she enjoy life in comfort and happiness for many years—and, once in a while, think for a moment of great battles and happy hours during the years of her incomparable and matchless service to the American Bar Association.

■ *The City of St. Francis*

"California, here we come!" and San Francisco is swinging wide its Golden Gate to welcome us. Its citizens and those of all California are honored that we have chosen to hold our meeting for the third time in the City of St. Francis. To the guests of the American Bar Association from the United States and from Canada and England, to the Bench and the Bar of our country, and to the families who accompany them, the lawyers of San Francisco, of the Bay Area, and of all of California and the Pacific Coast extend a heartfelt greeting and welcome. They hope our stay with them will be pleasant and profitable. In the spirit of the old Spanish phrase, "Nuestra casa es suya, Señora y Señor."

That is the greeting that is coming to us from "The City" that is the gateway to the West, a great metropolitan center that can give you a trip around the world with its varied quarters. It is famous for its hospitality and for its "know-how" to make visitors enjoy themselves whether at meetings in the convention halls, or at the Top-of-the-Mark; in the old Ferry Building or Golden Gate Park; viewing the San Francisco Navy Yard or aboard one of the large airplane carriers or other men-of-war; at the Veterans' Building or the War Memorial Opera House, which was the site of the United Nations Conference and the signing of the Charter. It is the center of giant redwoods, of hilltop skyscrapers topped only by the great bridge towers, of old missions and modern churches, of noted universities, and countless other spots of historical and current interest.

The record of previous meetings in San Francisco gives assurance that the meeting this year will again be outstanding. The programs and the speakers for the Assembly, Section and Committee meetings are all ex-

cellent. The advance registrations are high and it is anticipated that the final registered attendance will be among the best in the history of the American Bar Association. In view of the lateness of the date for the meeting this year these figures speak well for the great interest of the membership in the activities of the American Bar Association.

The weather should be delightful—possibly a bit foggy in the morning and cool in the evening, but pleasant in the daytime. You may see an occasional straw hat on the sunny side of the street and a topcoat on the shady side, but you will not need earmuffs, even in the evening!

The San Francisco meeting will be one never to be forgotten—it should be a record-breaker both for accomplishment and for entertainment. The welcome sign is out for you. Don't miss the 1952 Annual Meeting.

■ *Salute the Bar Associations!*

One of the valued members of the American Bar Association recently referred to your Board of Editors an eye-catching "Salute to the Bar Associations of Massachusetts". This advertisement—it was an advertisement—was published at the instance and in the name of the Old Colony Trust Company of Boston. Here is what it said:

> A Salute to the Bar Associations of Massachusetts
>
> The Bar Associations of Massachusetts were founded to insure high standards of ethics and training in the legal profession.
>
> In these times when the dignity and freedom of individual men and women are everywhere threatened by the erosion of Communism, the members of the Bar stand for the strength, stability, and merit of the democratic process.
>
> The existence in our American communities of a sound and vigorous **Bar** is of importance to every citizen. The citizen's rights are protected by laws. But laws are interpreted and enforced by men.
>
> In the Bar Associations of Massachusetts you are assured of finding qualified advocates to safeguard your rights, your property, and your liberty.
>
> We salute the Boston Bar Association, in the year of its Diamond Jubilee, and the Massachusetts Bar Association and its other affiliated Associations.

It was Solomon's advice to "let another man praise thee and not thine own mouth". This cordial gesture from the respected Old Colony Trust Company is pleasing for that reason. But it has additional merits, too.

Legal aid, and particularly the lawyer referral service, give bar associations a chance for self-advertisement. This is a desirable means of public information because all over America lawyers and bar associations are fighting for the rights of little people against big companies and big government. It is important that the American public respect them when they deserve it. Bar associations and lawyers with bank and insurance company connections can take a cue from this splendid example of cordial relations in Massachusetts.

Lawyers are too often pictured as mouthpieces of criminals and minions of bloated corporations. Some members of our craft undoubtedly deserve the censure they get, like those Communist lawyers who teased, tantalized and tortured Judge Medina. However, the vast majority of our profession are worthy, able, respected men—they deserve a snappy salute!

Signed Articles

As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

This photograph, taken at the Yellowstone Regional Meeting, June 17-20, shows (left to right) President Howard L. Barkdull, of Cleveland, Ohio; Roy E. Willy, of Sioux Falls, South Dakota, Chairman of the House of Delegates; President-Nominee Robert G. Storey, of Dallas, Texas; Ross L. Malone, Jr., of Roswell, New Mexico, member of the Board of Governors; Burt J. Thompson, of Forest City, Iowa, Chairman, Committee on Regional Meetings; Charles S. Rhyne, of Washington, D. C., member of the Committee on Regional Meetings, and Edward B. Love, of Chicago, Director of Activities.

THE PRESIDENT'S PAGE

Trout-Ware

HOWARD L. BARKDULL

■ This is the last President's Page for the current Association year and, in the next twelve issues of the JOURNAL, the page will be conducted by my successor in office, Robert G. Storey, of Dallas, Texas. Shortly after the present issue of the JOURNAL reaches your desk, Mr. Storey will take over the President's duties, at the close of the Annual Meeting in San Francisco. His administration will be a credit to himself and a source of great benefit to the Association.

I wish to take the present occasion to express deep appreciation to the other officers of the Association, to the Headquarters Staff, chairmen and members of Committees and Sections, members of the Board of Governors and House of Delegates, for the fine co-operation they have extended during the course of the year now ending.

Yellowstone Regional Meeting

It is entirely natural for the President of the Association to entertain the hope that the Regional Meetings held during his year in office shall be successful. This is especially true at the present time when the new series of meetings is in the formative stage.

To me it is a source of satisfaction to know that the two Regional Meetings of the current year have been of a high standard, carrying out the Association policy of giving emphasis to this program as a means of bringing the work of the Association to the lawyer in his own community.

A full account of the Yellowstone meeting appeared in the August issue of the JOURNAL. The most I will take occasion to say is that the entire atmosphere at Yellowstone was one of great enthusiasm. The lawyers of the Rocky Mountain states liked our program. The entertainment provided by the local committee and by the Bar of the participating jurisdictions was of the highest order. The reaction is best reflected by the numerous inquiries as to whether it will be possible to come back to the same region with another meeting in 1953 or the year following.

Great credit is due to Bill Jameson as chairman of the local committee; also to Burt Thompson who heads up the Special Committee of the Association on Regional Meetings. The burden of detail fell on the shoulders of Mr. Jameson. Few persons realize the amount of time and energy required for putting on an occasion of this kind, but the results justify the effort and words of appreciation were expressed on all sides at the Canyon Hotel and Lodge. A meeting at a resort hotel, without the benefit of a local bar association, is especially difficult, and Mr. Jameson was confronted with problems even greater than those of preceding meetings held in cities such as Louisville, Dallas and Atlanta.

Summary of Speaking Engagements

The total number of major addresses made by the President this year has been sixty-two. State bar associations represent approximately one-third, or a total of twenty. Eighteen addresses were delivered at the law schools, including two commencement addresses; ten to local bar associations, and fourteen appearances were at Judicial Conferences in various circuits, Regional Meetings, the Annual Meeting and before groups such as the Chamber of Commerce of the United States at Washington, the Trust Division of the American Bankers Association at New York, the National Legal Aid Association at Philadelphia, etc. It has been necessary to decline forty-five invitations, nearly all on account of conflict in dates.

The strain of travel, the preparation of addresses, the conduct of a heavy correspondence, attendance at many meetings and taking care of the executive and administrative work of the Association, combine to make the office of President a burdensome one. Plans are under way whereby in future years some of these duties, especially a considerable amount of correspondence, will be handled at the Headquarters Office under the supervision of Edward B. Love, Director of Activities. Every writer of a letter considers his item to be of such importance as to call for personal reply by the President, but he fails to appreciate the fact that in many instances someone at Headquarters knows more about the details and background of the subject than does the President. Questions of policy should of course have his individual attention.

Recent Itinerary

I was privileged to deliver the commencement address at the Law School of Western Reserve University in Cleveland, immediately after the receipt of the honorary degree of Doctor of Laws. Then came an address to the Iowa State Bar at Des Moines, followed by the trip to Yellowstone Park for the Regional Meeting. The next week I was at Asheville, North Carolina, addressing the Judicial Conference for the Fourth Circuit at Grove Park Inn. After a few days in Cleveland, I then went to Houston, for the State Bar of Texas and shortly thereafter to Mobile, addressing the Alabama State Bar. Preceding the San Francisco meeting, I am to be at Vancouver,

appearing before the Annual Meeting of the Canadian Bar Association.

Many people ask whether Mrs. Barkdull has accompanied me on the trips during the year. Over the winter, when flying conditions were at times uncomfortable, I did not urge Mrs. Barkdull to go along, but she has made a number of the recent journeys, including the Regional Meeting at Louisville and the delightful four days at Yellowstone. She will go to the Canadian Bar meeting in Vancouver and, of course, to the Annual Meeting in San Francisco.

The greater part of the year's traveling has been by air. Out of a total of 61,500 miles, plane transportation represents 48,000. On behalf of the airlines, let it be said that in these twelve months of travel, usually on a close schedule, I have not to the date of this writing missed a single speaking engagement.

Au Revoir

It is a source of great regret to me that no public announcement of specific character can yet be made on the new Headquarters site and building. A great deal of time has been devoted to the project. The question will be before the House of Delegates at San Francisco for final decision, and it goes without saying that the new administration will carry the plans forward with all energy.

I have complete faith and confidence in the new President. The Association is to be congratulated that for the coming year it will be under the guidance of a man so competent in every way as is Robert G. Storey.

Edward E. Odom, Solicitor for the Veterans Administration in Washington, D. C., sent us a photostatic copy of the following court record. We reprint it here for reasons which are obvious:

In The Matter of the Estate of Bettie Ann LaMonte, a minor } Annual Accounting, Veterans Administration Release

Comes the Veterans Administration, by its Chief Attorney, Kansas City jurisdiction, on behalf of the ward and her representative and file annual report charging the curator with National Service Life Insurance Special Dividend, $189.75 and Social Security Benefits October through May 1951, $241.60, a total, $431.35, crediting her with balance due her from last accounting $506 and claimed for clothing, and other necessaries $431.35, totaling $937.35, showing a present balance favor the curator, $506, the Veterans Administration prays approval of the accounting. Same is by the court examined, checked with vouchers, found in balance as claimed, and is approved.

The petitioner further represents and shows with the report as filed that the receipts from and through the Veterans Administration are concluded, to the astonishment of the Court, request is submitted that the Veterans Administration be discharged from further accountings, and the Curator be released from further duty of submitting her reports to it. The Court's heart being especially strong, withstood the shock of a Federal Body's releasing its grip upon State affairs, and was able to grant the prayer, and to wish the event many happy returns.

State of Missouri
County of Johnson } SS

I, Julia L. Downing, Clerk of the Probate Court, in and for the County and State aforesaid, hereby certify that the above and foregoing is a true and exact carbon copy of the entry made in the estate of Bettie Ann LaMonte, a minor, as record appears at page 188, Probate Record Book #49, in the proceedings of the twentieth day of the regular May Term of said Court, held 6th day of August, 1951.

Witness my hand and the seal of said Court this Aug 11, 1951.

JULIA L. DOWNING
Clerk, Probate Court
Johnson County, Missouri.

[SEAL]

Review of Recent Supreme Court Decisions

George Rossman
Editor-in-Charge

APPEALS

Appeal Raising Question of Constitutionality of State Statute Dismissed as Raising No Federal Question

■ *Palmer Oil Corporation* v. *Amerada Petroleum Corporation, Farwell* v. *Amerada Petroleum Corporation,* 343 U. S. 390, 96 L. ed. Adv. Ops. 680, 72 S. Ct. 358, 20 U. S. Law Week 4317. (Nos. 301 and 302, decided May 12, 1952.)

These cases challenged the constitutionality of an Oklahoma statute providing for unitized management of common sources of the supply of oil and gas in Oklahoma. The statute was repealed on May 26, 1951. Appellants contended that the statute and an order of the Oklahoma Corporation Commission promulgated thereunder impaired their contractual rights in violation of Article One, Section 10, of the United States Constitution and amounted to a denial of due process and equal protection guaranteed by the Fourteenth Amendment.

A *per curiam* opinion of the Supreme Court held that no substantial federal questions were raised in the light of previous decisions. The appeals were dismissed. Y.

The cases were argued by Mark H. Adams for appellants in No. 301, by Redford Bond, Jr., for appellants in No. 302, and by R. M. Williams for appellees.

CONSTITUTIONAL LAW

Term "Sacrilegious" Held To Be Not Sufficiently Definite To Justify Banning of Motion Picture on that Ground

■ *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 96 L. ed. Adv. Ops. 687, 72 S. Ct. 777, 20 U. S. Law Week 4329. (No. 522, decided May 26, 1952.)

At issue in this case was the constitutionality of a decision of the New York Board of Regents banning the showing of the motion picture film *The Miracle* in New York City. The Board, which is charged by a New York statute with the duty of granting a license to a motion picture film "unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime . . . .", rescinded a license to show *The Miracle* on the ground that it was "sacrilegious". Appellant brought this action in the state courts to review the Regents' determination, contending (1) that the statute violated the Fourteenth Amendment as a prior restraint upon freedom of speech and of the press, (2) that it was invalid as a violation of the guarantee of separation of church and state and as a prohibition of the free exercise of religion, and (3) that the term "sacrilegious" was so vague and indefinite as to offend due process. The Appellate Division affirmed the Regents' determination. The New York Court of Appeals affirmed, two judges dissenting.

The Supreme Court of the United States reversed in an opinion written by Mr. Justice CLARK. Remarking that "As we view the case, we need consider only appellant's contention that the New York statute is an unconstitutional abridgment of free speech and a free press", the opinion held motion pictures to be "within the ambit of protection which the First Amendment, through the Fourteenth, secures to any form of 'speech' or 'the press' ", expressly overruling any language in *Mutual Film Corporation* v. *Industrial Commission,* 236 U. S. 230, 35 S. Ct. 387 (1915), to the contrary. It was pointed out that motion pictures are a medium for the communication of ideas that may affect public attitudes and behavior, and the fact that their primary purpose is entertainment is immaterial.

In reversing the New York court's holding, Mr. Justice CLARK found that its definition of "sacrilegious" (". . . no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule. . . .") was "far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society". Under the standard that the New York court approved, he said, "the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority". He declared that "It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures".

Mr. Justice FRANKFURTER, joined by Mr. Justice JACKSON, concurred in the judgment of the Court. He wrote an opinion in which he examined the history of the word *sacrilege.* He thought that the New York court erred in holding that the word provided a sufficiently definite standard for judicial review of the validity of the Regents' action. Y.

The case was argued by Ephraim S. London for appellant, and by Charles A. Brind, Jr., and Wendell P. Brown, for appellees.

CONSTITUTIONAL LAW

New York City Released Time Program for Religious Classes Upheld and Distinguished from Released Time

Reviews in this issue by Mark H. Johnson and Rowland L. Young.

Condemned in *McCollum* v. *Board of Education*

▪ *Zorach* v. *Clauson*, 343 U. S. 306, 96 L. ed. Adv. Ops. 609, 72 S. Ct. 679, 20 U. S. Law Week 4285. (No. 431, decided April 28, 1952.)

This case upheld the constitutionality of the New York City plan of released time for students in public schools to attend churches for religious instruction. The program permits students to leave the school premises during school hours to go to religious centers for instruction or devotional exercises. Those not released stay in the classrooms. Weekly reports to the schools are made by the churches containing a list of children who have been released but who have not reported for religious instruction. (See 37 A. B. A. J. 775; October, 1951.)

The opinion of the Supreme Court, upholding the validity of the program was delivered by Mr. Justice DOUGLAS, who distinguished the case from *McCollum* v. *Board of Education*, 333 U. S. 203, 68 S. Ct. 461, 34 A. B. A. J. 318; April, 1948. It was pointed out that all costs of the New York program, including application blanks, were borne by the churches. Declaring that "No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools", the opinion rejected an argument that the program involves the use of coercion to get public school students into religious classrooms. A different case would be presented, it was said, "If in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction...." Observing that "We are a religious people whose institutions presuppose a Supreme Being", the opinion held that to strike down the program "would be to find in the Constitution a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe."

Mr. Justice BLACK wrote an opinion dissenting on the ground that there was no substantial difference between the instant case and the *McCollum* case.

Mr. Justice FRANKFURTER wrote a dissenting opinion in which he expressed the view that petitioners had not been allowed to prove the issue of coercion. He also expressed agreement with the dissent of Mr. Justice JACKSON.

In his dissenting opinion, Mr. Justice JACKSON held that the school served as a "temporary jail" for the students who were not excused, which he thought constituted "governmental restraint". Y.

The case was argued by Kenneth W. Greenawalt for appellants, and by Wendell P. Brown, Michael A. Castaldi and Charles H. Tuttle for appellees.

CONSTITUTIONAL LAW

President's Seizure of Steel Mills Held To Be Unconstitutional

▪ *Youngstown Sheet and Tube Company* v. *Sawyer, Sawyer* v. *Youngstown Sheet and Tube Company*, 343 U. S. 579, 96 L. ed. Adv. Ops. 817, 72 S. Ct. 863, 20 U.S. Law Week 4365. (Nos. 744 and 745, decided June 2, 1952.)

On April 8, the President issued Executive Order 10340 directing the Secretary of Commerce to seize most of the nation's steel mills to avert a nationwide steel strike called after the breakdown of collective bargaining negotiations between the United Steel Workers of America and representatives of the steel industry. The District Court for the District of Columbia issued a preliminary injunction restraining the Secretary from "continuing the seizure and possession of the plant . . . and from acting under the purported authority of Executive Order No. 10340". The Court of Appeals for the District of Columbia Circuit stayed the district court's injunction. On writ of certiorari before the Supreme Court, the following issues were raised: "*First*. Should final determination of the constitutional validity of the President's order be made in this case which has proceeded no further than the preliminary injunction stage? *Second*. If so, is the seizure order within the constitutional power of the President?"

The opinion of the Court was delivered by Mr. Justice BLACK. Answering the argument that no injunction should have been issued because seizure did not inflict irreparable damages and there were adequate legal remedies available, he declared that "Prior cases in this Court have cast doubt on the right to recover in the Court of Claims on account of properties unlawfully taken by government officials for public use as these properties were alleged to have been. . . . Moreover, seizure and government operation of these going businesses were bound to result in many present and future damages of such nature as to be difficult, if not incapable, of measurement."

In holding that the seizure order went beyond the constitutional power of the executive, the opinion pointed out that the President had not relied upon any statutory authorization in issuing Order No. 10340, but instead had recited the authority "vested in me by the Constitution and laws of the United States, and as President of the United States and Commander in Chief of the armed forces. . . ." It was held that nothing in the President's powers as commander in chief gave him the "ultimate power as such to take possession of private property in order to keep labor disputes from stoping production. This is a job for the Nation's lawmakers, not for its military authorities". As for the theory of "inherent executive authority" to avert national disaster, the Court ruled that the President's power to see that the laws are faithfully executed "limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad". The legislative power was clearly reserved to Congress by the first clause of Article One of the Constitution, it was declared.

In a concurring opinion, Mr. Justice FRANKFURTER considered the legality of Executive Order No. 10340 "without attempting to define the President's powers comprehensively". Declaring that "We must therefore put to one side consideration of what powers the President would have had if there had been no legislation whatever bearing on the authority asserted by the seizure, or if the seizure had been only for a short, explicitly temporary period, to be determined automatically unless Congressional approval were given", he said that a proposal to give the President such seizure powers had been explicitly rejected by the Congress in the debate on the Labor-Management Relations Act of 1947.

The concurring opinion of Mr. Justice DOUGLAS held that the President's action in seizing the mills was legislative in nature and therefore invaded the powers reserved to the Congress.

Mr. Justice JACKSON's concurring opinion canvassed the nature and extent of the Presidential authority and concluded that the Chief Executive had no seizure authority aside from what Congress chose to give him.

In his concurring opinion, Mr. Justice BURTON held that the President had declined to follow the procedures set up by Congress to handle the problem and therefore had no seizure powers "under the present circumstances". The situation was not comparable to that "of an imminent invasion or a threatened attack," he declared. In his view, the order violated the essence of separation of powers.

Mr. Justice Clark's concurring opinion held that the President had "extensive authority" in time of grave national emergencies. "Where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; but . . . in the absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation". He could not sustain the President's action here, Mr. Justice CLARK said, because Congress had laid down the procedure to be followed.

A dissenting opinion written by the CHIEF JUSTICE, in which Mr. Justice REED and Mr. Justice MINTON joined, declared the President's action to be constitutional. The opinion relied upon the President's constitutional duty to "take Care that the Laws be faithfully executed", and cited presidential duty under the Defense Production Act and the Mutual Security Act, noting that the purposes of those acts were being thwarted by the steel strike.

Y.

The case was argued by John W. Davis for the petitioners in No. 744 and the respondents in No. 745, and by Solicitor General Philip B. Perlman for the respondent in No. 744 and the petitioner in No. 745.

CRIMINAL LAW

Conviction of Manslaughter by State Court Affirmed on Ground that State Courts Rested Judgment on Adequate Nonfederal Grounds

■ *Stembridge* v. *Georgia*, 343 U. S. 541, 96 L. ed. Adv. Ops. 753, 72 S. Ct. 834, 20 U. S. Law Week 4320. (No. 474, decided May 26, 1952.)

Petitioner Stembridge was convicted of voluntary manslaughter after the fatal shooting of a woman in an altercation growing out of a business transaction. He pleaded self-defense. The Court of Appeals of Georgia affirmed and the state supreme court denied a writ of certiorari. Petitioner thereafter filed in the trial court an "Extraordinary Motion for New Trial", alleging that newly discovered evidence would establish his innocence. This motion was accompanied by affidavits of ten of the jurors stating that they "would have never agreed to any verdict except one of not guilty" had the new evidence been presented at the trial. The evidence consisted of a conflict between a witness' written statement and her testimony at the trial. The court of appeals held that the newly discovered evidence was impeaching only and was not the basis for a new trial under Georgia law. Petitioner then filed a motion for rehearing in the court of appeals, raising constitutional issues for the first time. He contended that the state's use of evidence, with the knowledge that it was perjured, was a denial of due process and equal protection. The motion for rehearing was denied.

Speaking for the Supreme Court of the United States, Mr. Justice MINTON affirmed on the theory that the state supreme court had had no opportunity to consider the constitutional questions and that its judgment might have rested upon an adequate nonfederal ground.

Mr. Justice REED noted that he joined in the judgment of the Court but thought that the better course would have been to affirm the decision of the Georgia courts.

Mr. Justice BLACK, Mr. Justice FRANKFURTER and Mr. Justice BURTON dissented without opinion. Y.

The case was argued by Marion W. Stembridge, *pro se*, and by M. H. Blackshear, Jr., for respondent.

LIBEL

"Group Libel Law" Held Not To Violate Due Process

■ *Beauharnais* v. *Illinois*, 343 U. S. 250, 96 L. ed. Adv. Ops. 620, 72 S. Ct. 725, 20 U. S. Law Week 4291. (No. 118, decided April 28, 1952.)

An Illinois statute makes it unlawful "to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place . . . any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. . . ." Beauharnais was convicted of violating this provision after he passed out leaflets on the streets of Chicago. The leaflets contained a petition to the Mayor and City Council calling on them "to halt the further encroachment, harassment and inva-

sion of white people, their property, neighborhoods and persons, by the Negro. . . ." The leaflets called for "One million self respecting white people in Chicago to unite", adding that "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will." Attached was an application form for membership in the White Circle League, Inc., an organization of which Beauharnais was president. The Illinois Supreme Court affirmed the conviction and fine of $200, rejecting defendant's allegation that the statute violated the liberty of speech and press guaranteed against invasion by the states by the due process clause of the Fourteenth Amendment, and as too vague to support the conviction.

The opinion of the Supreme Court of the United States affirming was delivered by Mr. Justice FRANKFURTER. In upholding the validity of the "group libel law", Mr. Justice FRANKFURTER found that it was "specifically directed at a defined evil, its language drawing from history and practice in Illinois and in more than a score of other jurisdictions. . . . We do not, therefore, parse the statute as grammarians or treat it as an abstract exercise in lexicography. We read it in the animating context of well-defined usage. . . ." He declared that the precise question before the Court was whether the due process clause prevented a state from punishing criminal libel, as defined and constitutionally recognized for centuries, when it is directed at a group. He reviewed briefly the history of racial strife in Illinois and declared that the Illinois legislature could well conclude that utterances of the kind here in question played a significant part in the outbreak of disorder and violence. "In the face of this history and its frequent obligato of extreme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented." He dismissed the argument that the power of the legislature sanctioned by the holding might be abused. "Every power may be abused, but the possibility of abuse is a poor reason for denying Illinois the power to adopt measures against criminal libels sanctioned by centuries of Anglo-American law."

He refused to consider an argument that defendant was not permitted at the trial to justify the utterance as a "fair comment" or as a privileged means of redressing grievances, on the ground that the defendant had not raised these defenses in the court below and had not relied upon them as a ground for reversal of the conviction.

Defendant had offered evidence tending to prove the truth of parts of the utterance, but Mr. Justice FRANKFURTER ruled that this was an insufficient basis for reversal, pointing out that Illinois law requires a showing not only that the allegedly libelous utterance state the facts but also that the publication be made "with good motives and for justifiable ends".

Mr. Justice BLACK wrote a dissenting opinion in which Mr. Justice DOUGLAS joined. In their view, the statute was an encroachment on freedom of expression, forbidden by the First Amendment, and was not "that criminal libel which has been 'defined, limited and constitutionally recognized time out of mind' ".

Mr. Justice REED wrote a dissenting opinion in which Mr. Justice DOUGLAS also joined. This opinion found that the statutory language "virtue", "derision" and "obloquy" were insufficiently clear to support the validity of the statute.

In a separate dissenting opinion, Mr. Justice DOUGLAS declared that "if in any case other public interests are to override the plain command of the First Amendment, the peril of speech must be clear and present, leaving no room for argument, raising no doubts as to the necessity of curbing speech in order to prevent disaster". He saw in the Court's opinion a condonation of "an expanding legislative control" of speech.

Mr. Justice JACKSON wrote a dissenting opinion in which he declared that the Fourteenth Amendment did not incorporate the restrictions of the First and apply them to the states, and that the states had wider latitude than the Federal Government in determining the substantive evils they might prohibit. He thought that the Illinois statute involved here, however, went beyond the permissible bounds of the Constitution. Y.

The case was argued by Alfred A. Albert for petitioner, and by William C. Wines for respondent.

MONOPOLIES

Provision of Antitrust Decree Requiring Compulsory Patent Licensing or Sale Upheld

■ *Besser Manufacturing Company* v. *United States*, 343 U. S. 444, 96 L. ed. Adv. Ops. 757, 72 S. Ct. 838, 20 U. S. Law Week 4348. (No. 230, decided May 26, 1952.)

The United States brought a civil action under Section 4 of the Sherman Act charging appellants Besser Manufacturing Company, Jesse H. Besser and others with conspiring to restrain and monopolize interstate commerce in the concrete block-making machinery industry. The district court found the Government's charges clearly proved, finding that defendants sought to eliminate competition through outright purchase of competitors and strict patent-licensing arrangements. The court then entered the judgment which was attacked on this appeal by two of the defendants.

On direct appeal to the Supreme Court, Mr. Justice JACKSON affirmed the judgment. He declared that there was not "the slightest ground" to support appellants' contentions that the factual conclusions of the trial court were erroneous. Appellants attacked provisions of the judgment

requiring them to issue patent licenses on a fair royalty basis and to grant to their existing licensees an option to terminate or continue their lease or to purchase their leased machines. It was contended that these provisions were punitive, confiscatory and inappropriate. In reply, Mr. Justice JACKSON said that both compulsory patent licensing and the compulsory sale provision are well-recognized remedies where patent abuses are proved in antitrust actions. He pointed out that appellants were left free to lease rather than sell if they could make the lease sufficiently attractive.

Appellants had also raised a due process argument in regard of the method adopted for fixing reasonable royalty rates under the patent licenses. When a committee of four appointed by appellants and the Government reached an impasse on the rates, the trial judge stepped in as a fifth arbitrator and voted for the rates proposed by the Government-appointed committee members. Mr. Justice JACKSON upheld this, saying that it was not necessary to set royalties "in judicial proceedings based on the hearing and evaluation of evidence in the light of appropriate criteria" as contended by appellants. "... it was always within the power of the trial judge to establish the royalty rates, and, in voting as he did, he did just that".

Mr. Justice CLARK took no part in the consideration or decision of the case. Y.

The case was argued by Carl R. Henry for appellants, and by Marcus A. Hollabaugh for appellee.

MONOPOLIES

Doctor-Sponsored Prepaid Medical Plan Held Not To Violate Sherman Act

■ *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 96 L. ed. Adv. Ops. 583, 72 S. Ct. 690, 20 U. S. Law Week 4281. (No. 19, decided April 28, 1952.)

This was a suit brought by the United States against the Oregon State Medical Society, various county medical societies in Oregon and eight individual doctors, alleging that they had conspired to restrain and monopolize the business of providing prepaid medical care in the state and that they had conspired to restrain competition among the doctor-sponsored state and local plans of prepaid medical care. In 1941 the Oregon State Medical Society and the organized medical profession in the state set up nonprofit corporations to furnish prepaid medical, surgical and hospital care on a contract basis. The action was taken after several years of opposition on the part of the physicians to prepaid medical certificates sold by private organizations. The district judge dismissed the Sherman Act complaint on the ground that the Government had proved none of its charges by a preponderance of evidence (see 36 A. B. A. J. 1033; December, 1950). The Government took this direct appeal to the Supreme Court, requesting that the trial judge's findings be overruled and that it be held that the business of providing prepaid medical care is interstate commerce.

The Supreme Court affirmed the judgment of the trial judge speaking through Mr. Justice JACKSON. Rejecting a contention that the trial judge erred in grouping the events into two periods of time and in holding that events that occurred prior to 1941 were "ancient history", Mr. Justice JACKSON's opinion relied upon the evidence, contained in the testimony of individual Oregon doctors, that appellee's pre-1941 practices had been abandoned. He could find no "concerted refusal to deal with private health associations" by the doctors, noting that 1210 of the 1660 licensed physicians in the state in 1948 were members of the state medical society and that 1085 Oregon doctors billed and received payment directly from one private medical-care plan alone. He found no substance in the charge that the refusal of the state health plan to provide prepaid medical care in an area where a county association had a plan in operation constituted a conspiracy in restraint of trade. "This is not a situation where suppliers of commercial commodities divide territories and make reciprocal agreements to exploit only the allotted market, thereby depriving allocated communities of competition" he declared. "This prepaid plan does not apply to, and its allocation does not withhold from, any community medical service or facilities of any description. No matter what organization issues the certificate, it will be performed, in the main, by the local doctors. The certificate serves only to prepay their fees." The opinion declared that "Almost everything pointed to in the record by the Government as evidence that interstate commerce is involved in this case relates to across-state-line activities of the private associations. It is not proven, however, to be adversely affected by any allocation of territories by doctor-sponsored plans. So far as any evidence brought to our attention discloses, the activities of the latter are wholly intrastate."

Mr. Justice BLACK dissented without opinion.

Mr. Justice CLARK took no part in the consideration or decision of the case. Y.

The case was argued by Stanley M. Silverberg for appellant, and by Nicholas Jaureguy for appellees.

PUBLIC UTILITIES

Broadcast of Radio Programs Aboard Public Transit Vehicles Held Not To Violate "Right of Privacy"

■ *Public Utilities Commission of the District of Columbia* v. *Pollak*, *Pollak* v. *Public Utilities Commission of the District of Columbia*, 343 U. S. 451, 96 L. ed. Adv. Ops. 710, 72 S. Ct. 813, 20 U. S. Law Week 4343. (Nos. 224 and 295, decided May 26, 1952.)

In this case the Supreme Court held that radio receivers operated aboard public transit vehicles are not forbidden by the Constitution. Capital Transit Company is a privately owned public utility corporation operating a street railway and bus system in the District of Columbia under a franchise from Congress. It

granted Washington Transit Radio, Inc., the right to install, maintain and use radio reception equipment in its streetcars, buses and terminal facilities. Transit Radio arranged with a Washington radio station to broadcast programs to be received and amplified through loud speakers in streetcars and buses. In July, 1949, the Public Utilities Commission of the District of Columbia, on its own motion, ordered an investigation to determine whether the installation and use of the receivers was "consistent with public convenience, comfort and safety". Transit Radio was allowed to intervene, as were Pollak and Martin, protesting Capital Transit passengers who are the respondents in No. 224. The Commission concluded "that the installation and use of radios in streetcars and buses of the Capital Transit Company is not inconsistent with public convenience, comfort, and safety" and dismissed its investigation. (36 A. B. A. J. 224; March, 1950.) Pollak and Martin appealed to the United States District Court for the District of Columbia; their appeal was dismissed; the Court of Appeals for the District of Columbia Circuit partially reversed and gave instructions to vacate the Commission's order, holding that the broadcasts "deprive objecting passengers of liberty without due process of law", limiting their holding to commercials and reserving judgment on the question of the broadcast of music alone. (See 37 A. B. A. J. 612; August, 1951.)

Mr. Justice BURTON delivered the opinion of the Supreme Court reversing. After reviewing the Commission's findings and its statutory authority, he declared that "there can be little doubt that, apart from the constitutional questions here raised, there is no basis for setting aside the Commission's decision". He found no merit in the contention that the radio programs interfered with freedom of conversation or communication under the First Amendment, observing that there was no finding that the broadcasts interfered with the conversation of passengers, and that there was no substantial claim that the programs had been used for objectionable propaganda. As for the claim that the broadcasts invaded the passengers' right of privacy, protected by the Fifth Amendment, he said "This claim is that no matter how much Capital Transit may wish to use radio in its vehicles as part of its service to its passengers and as a source of income, no matter how much the great majority of its passengers may desire radio in those vehicles, and however positively the Commission, on substantial evidence, may conclude that such use of radio does not interfere with the convenience, comfort and safety of the service but tends to improve it, yet if one passenger objects to the programs as an invasion of his constitutional right of privacy, the use of radio on the vehicles must be discontinued." This view of the Fifth Amendment was held to be erroneous, the opinion stating that it would "permit an objector, with a status no different from that of other passengers, to override not only the preference of the majority of the passengers but also the considered judgment of the federally authorized Public Utilities Commission. . . . The liberty of each individual in a public vehicle or public place is subject to reasonable limitations in relation to the rights of others."

Mr. Justice BLACK, in a short opinion, said that he agreed with the Court that there was no violation of the First or Fifth Amendments in the broadcasting of musical programs on public vehicles, but that he dissented "To the extent, if any," that the Court held that the Constitution permitted subjecting the passengers "to the broadcasting of news, public speeches, views, or propaganda of any kind and by any means. . . ."

Mr. Justice FRANKFURTER disqualified himself from consideration or decision of the case, stating that his feelings were "so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it".

Mr. Justice DOUGLAS wrote a dissenting opinion in which he declared that the streetcar audience "is a captive audience. . . . One who enters any public place sacrifices some of his privacy. My protest is against the invasion of his privacy over and beyond the risks of travel." He declared that "If liberty is to flourish, government should never be allowed to force people to listen to any radio program. The right of privacy should include the right to pick and choose from competing entertainments, competing propaganda, competing political philosophies. . . ." Y.

The cases were argued by W. Theodore Pierson for the Public Utilities Commission, and by Paul M. Segal for Pollak and Martin.

TAXATION

Expense Deduction Is Allowed for Optician's "Kickbacks" to Doctors Where Such Practice Was Not Illegal

■ *Lilly* v. *Commissioner*, 343 U.S. 90, 96 L. ed. Adv. Ops. 385, 72 S. Ct. 497, 20 U.S. Law Week 4170. (No. 158, decided March 10, 1952).

The taxpayers, owners of several optical stores, customarily paid a percentage of their eyeglass sales receipts to the doctors who had prescribed the glasses. Deduction for these "kickbacks" was disallowed by the Government as not "ordinary and necessary business expense", because they offended public policy. The disallowance was sustained by the Tax Court and by the Fourth Circuit. The Supreme Court reversed in a unanimous opinion by Mr. Justice BURTON.

The Court reasoned that the expenses were "ordinary" because the practice was common in the community; they were "necessary" because otherwise the taxpayer's competitors would have obtained the business; they were not illegal, nor did they "frustrate sharply defined national or state policies". The opinion points out that standards of professional organizations and subsequent legislation outlawing the practice do not warrant a "retroactive" tax penalty. There is an admonition to the taxing authorities to leave such policing to "those qualified to pass judgment".

Mr. Justice DOUGLAS took no part in the consideration or decision of the case. J.

The case was argued by Randolph E. Paul for petitioners, and by Solicitor General Philip B. Perlman for respondent.

TAXATION

Income Tax Deduction Is Disallowed for Expense of Contesting a Gift Tax Deficiency

■ *Lykes* v. *United States*, 343 U.S. 118, 96 L. ed. Adv. Ops. 495, 72 S. Ct. 585, 20 U.S. Law Week 4227. (No. 173, decided March 24, 1952).

The taxpayer sought an income tax deduction for the legal expense of compromising a gift tax deficiency involving the valuation of stock donated to his family. In a suit for refund, the claim was allowed by the district court, but the decision was reversed by the Fifth Circuit. The disallowance was sustained by the Supreme Court in an opinion by Mr. Justice BURTON.

The item was held not to qualify as an expense incurred "for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income", because the expense was "related" to a personal transaction. It is immaterial that the expense was incurred to preserve income-producing assets from the gift tax lien. The opinion therefore sustains the Treasury Regulations denying the deduction for such items.

Mr. Justice JACKSON dissented, in an opinion joined by Mr. Justice FRANKFURTER. The dissent notes the Treasury's "self-interest" in discouraging taxpayers from contesting its unjustified demands for taxes, and suggests that such regulations should be disregarded.

Mr. Justice BLACK dissented without opinion. J.

The case was argued by George W. Ericksen for petitioner, and by Harry Baum for respondent.

TAXATION

Money Obtained by Extortion Is Taxable Income

■ *Rutkin* v. *United States*, 343 U.S. 130, 96 L. ed. Adv. Ops. 485, 72 S. Ct. 571, 20 U.S. Law Week 4231. (No. 195, decided March 24, 1952).

The taxpayer appealed from a conviction for attempting to evade income tax on the ground that he did not have taxable income. The item in question was $250,000 which the court found he had obtained from a former business associate by extortion, through false claims, harassing demand and threats to kill the latter and his family. The conviction was sustained in an opinion by Mr. Justice BURTON.

The opinion states that the unlawfulness of gains is traditionally no barrier to their taxability. Here, there could be no question as to the result if the taxpayer had obtained the money by fraud instead of by fear. The result should be no different merely because his fraud was "so transparent that it did not mislead his victim". The opinion states, without further analysis, that the case is distinguishable from that of *Commissioner* v. *Wilcox*, 327 U.S. 404, where an embezzler was held not to have realized taxable income.

Mr. Justice BLACK dissented, in an opinion joined by Mr. Justice REED, Mr. Justice FRANKFURTER and Mr. Justice DOUGLAS. The dissent vigorously protested that the taxpayer was being convicted for the crime of extortion rather than for the tax crime. J.

The case was argued by Jack L. Cohen for petitioner, and by Irving I. Axelrad for respondent.

State Bar Commends Steel Decision

■ The first word received by the JOURNAL of state bar action relating to the recent steel decision came in the form of the following resolution, offered by John D. Black, of Chicago, and adopted by the Illinois State Bar Association at its annual meeting:

> The Illinois State Bar Association in its annual meeting during the week of the opinion of the Supreme Court of the United States, which reaffirmed its strong support of the Constitution of the United States, again states its confidence in our great Court and its reliance on the Court to sustain and maintain our country.

Courts, Departments and Agencies

George Rossman • EDITOR-IN-CHARGE **Maxine M. Sprung** • ASSISTANT

Drugs and Druggists . . . Minnesota pharmacy law . . . state statute restricting sales of "drugs" to pharmacies construed to prohibit sale of vitamins in grocery stores.

▪ *Culver* v. *Nelson et al.*, Minn. Sup. Ct., May 29, 1952, Knutson, J., 54 N. W. 2d 7 (Digested in 20 U.S. Law Week 2584, June 10, 1952).

Plaintiff, a retail grocer, brought this action to obtain a declaratory judgment determining whether the Minnesota pharmacy law (M.S.A. c. 151) prohibits him from selling vitamins at retail. Defendants, members of the state board of pharmacy, contended that vitamins are drugs within the definition of the state pharmacy law and, therefore, they may be sold only in a pharmacy under the personal supervision of a pharmacist. The statute defines "drugs" as meaning "all medicinal substances and preparations recognized by the United States pharmacopoeia and national formulary . . . and all substances and preparations intended for external and internal use in the cure, mitigation, treatment, or prevention of disease in man or other animal, and all substances and preparations, other than food, intended to affect the structure or any function of the body of man or other animal".

The Court held that the vitamin products plaintiff wanted to sell came within all three parts of the definition. Plaintiff argued that none of the products are recognized by the United States pharmacopoeia, but the Court replied that the constituent elements of the preparations were so recognized and "the mere fact that several drugs compounded together are dispensed in a neutral excipient does not destroy their classification as a drug". The second part of the definition was satisfied, the opinion stated, by the fact that vitamins may be used internally for the cure, treatment or prevention of disease. Even plaintiff's experts testified that a vitamin deficiency may be a disease and, when a vitamin is prescribed for the treatment of such a disease, it is a drug. As for the third subdivision, "there is no dispute", the Court said, that vitamins, although component parts of food, "may still be a drug when used to affect the structure or function of the body in a way that ordinarily is not true of food".

The Court admitted that there are cases in other jurisdictions holding such an interpretation of a pharmacy law unconstitutional, but it believed that the prohibition on the sale of vitamins in grocery stores is directly related to the protection of the public health and welfare, even though the evidence showed that vitamins are dispensed at pharmacies by ordinary clerks who are not pharmacists and without prescriptions. Pharmacists are better equipped to advise prospective purchasers what vitamins are best, the opinion stated, and also they know how to preserve the vitamins' beneficial qualities from adverse temperature and light conditions.

Federal Communications Commission . . . radio station's broadcast of senator's regular weekly program after he had announced his candidacy for re-election obligates station to afford equal opportunity to other candidates even if senator's program was not political in nature.

▪ In a letter addressed to Radio Station KNGS, Hanford, California, dated May 15, 1952, the Federal Communications Commission stated that the station's broadcast of a regular weekly "Report from Congress" program by a United States Senator who had declared his candidacy for re-election obligates the station to afford equal broadcast time to other legally qualified senatorial candidates. A rival candidate's request for like time for a similar program had been denied on the ground that the senator's "Report from Congress" was not a political broadcast.

It was the Commission's opinion that to the extent that the senator's program was carried by the station subsequent to the date on which he announced his intention to run for re-election it was "permitting a legally qualified candidate for a public office to use its broadcasting station". The station thus had a statutory duty under §315 of the Communications Act and §3.190 of the Commission's Rules and Regulations to afford equal opportunity to other legally qualified candidates for the same office. Although the senator had not yet qualified for a place on the primary ballot the Commission includes in its definition of a "legally qualified candidate" a person who has publicly announced his candidacy in a primary election.

With respect to the station's contention that the broadcasts were not "political" in nature, the Commission pointed out that §315 of the Act contains no requirements as to the "political" nature of broadcasts to bring them within the provisions of that section.

Labor Law . . . employer interference with elections . . . department store discriminatorily applied its no-solicitation rule by refusing to permit union to address employees on company time and premises after store's president

gave antiunion speech under such circumstances.

■ *Bonwit Teller, Inc.* v. *National Labor Relations Board,* C.A. 2d, June 17, 1952, Hand, A.N., C.J.

The National Labor Relations Board had held in this case that a retail department store had interfered with its employees' freedom of choice in a representation election, violating §8 (a)(1) of the National Labor Relations Act; see 37 A.B.A.J. 927, December, 1951. The department store maintained a policy of forbidding all solicitation by union organizers in its stores either during the employees' working time or when they were off duty. However, six days before a run-off representation election was to be held, the store was closed one-half hour early and the employees were addressed by the company president. He informed them that expected wage increases would not be put through until after the election. The Monday following the president's speech the union requested an opportunity to address the employees under similar conditions, but the request was never answered. The Board held that the president's speech and company's refusal to honor the union's request violated the Act.

On appeal, the Court first ruled that the president's speech did not involve promises of benefit or threats of reprisal calculated to deter the employees from voting for the union. The opinion said that his remarks merely explained that increases in pay would be delayed by the bargaining process if the union should win. It did not carry the threat that the company would cause such delay. The Court stated: "Indeed, to forbid such communications would seem to prohibit all discussions between employer and employee of issues germane to the subject of unionization."

The other question to be decided was the correctness of the Board's holding that the store had violated the Act by failing to grant the union's request for an opportunity to reply to the president's speech. The company contended that the Board's decision is contrary to §8 (c) of the Act guaranteeing free speech to employers in labor disputes. But the Court did not believe any issue of "employer free speech" is involved in the case. Rather, it regarded the company's refusal to amount to a discriminatory application of the broad no-solicitation rule which retail department stores are permitted to enforce. In the Court's opinion, having chosen to avail itself of the privilege, the store was "required to abstain from campaigning against the Union on the same premises to which the Union was denied access; if it should be otherwise, the practical advantage to the employer who was opposed to unionization would constitute a serious interference with the right of his employees to organize". However, the Court stated that the Board had phrased its order too broadly when it ordered the employer to stop making speeches during working hours unless the union was given a similar opportunity to present its views. The store should be permitted an election between abandoning its no-solicitation rule and taking the action directed by the Board, it declared.

Enforcement of the order was denied and the proceedings were remanded to the Board.

Swan, Chief Judge, dissented in part. He said that under §8 (c), granting the employer the privilege of arguing against unionization, the company was not required to accord union representatives opportunities similar to its own to address employees on company time and property.

Labor Law . . . appropriate bargaining unit . . . nation-wide bargaining unit of employees in all plants of single employer found inappropriate because of long history of collective bargaining on local, single plant, multiemployer basis, local autonomy of branch plants and local nature of baking business.

■ *In re Continental Baking Co.,* Case No. 2-RC-2357, NLRB, June 20, 1952.

By a vote of two to one, the National Labor Relations Board dismissed the petition of a union (Continental Division) requesting a collective bargaining unit including all the inside employees of the nation's largest wholesale baker (Continental), which has plants scattered throughout the country. The Board found the requested unit to be inappropriate because of (1) the long history of collective bargaining on a local area, multiemployer basis, (2) the local autonomy of the branch plants and (3) the local nature of the baking business.

Section 9 (b) of the Act provides that the Board shall decide whether the appropriate unit is the "employer unit, craft unit, plant unit, or subdivisions thereof", but otherwise there are no specific guides to aid the Board in its determination. However, the Board stated that over the years it has developed a central principle that "mutuality of interest in wages, hours and working conditions" is the prime determinant of unit appropriateness. The union argued that a nation-wide single employer unit is "inherently appropriate", but the Board replied that this argument is based on a "misunderstanding" of the Board's use of that expression. In cases where the single employer unit was so described the Board was concerned with the issue of whether a single employer or a multiemployer unit was appropriate, rather than the appropriateness of a multiplant, single employer unit. It stressed the fact that whether such a unit is appropriate depends on the facts of the particular case, and where it has found a multiplant unit appropriate it has relied principally on evidence of "Integration, centralized control, or bargaining history on a multiplant basis". However, in the instant case the only justification for organizing Continental's widely scattered plants into a single bargaining unit was the fact of a common employer and the baking of the same products. Continental's centralization of such functions as purchasing, advertising and insurance in New

York were regarded as "not significant" because those functions "have no effect upon the interests of production employees".

The opinion then stated that the Board found the following factors very significant as indicating that employee community of interest is local rather than national: "Continental's plants are scattered over thousands of miles of territory. . . . There is therefore little or no contact among employees of the several plants. Nor is there any interchange of employees among plants, except on an insignificant scale. Because of the perishability of its product, the wholesale baking industry is essentially local. Each of Continental's plants is to a considerable extent an autonomous operation. . . . The manager has complete authority to hire, promote, discharge and discipline production and maintenance employees. Payrolls are prepared in each plant and are met by drawing on funds deposited in local banks. Job classifications vary from plant to plant. So do wages, hours, terms and conditions of employments, as the result of the long history of bargaining on a local basis."

The opinion was signed by Chairman Herzog and Board Member Murdock.

Board Member Styles dissented, stating that he would find the employer-wide unit to be appropriate and that he would direct an election in such a unit. He said that the majority opinion had assumed that the union could withdraw from the multiemployer local units if it so desired, but he believed that such withdrawal, if permitted, would conflict with the Board's policy against permitting unions, although not employers, to sever themselves from a multiemployer group. He remarked that this question has never been decided and the Board should have taken this opportunity to rule on the issue. In addition, Member Styles was of the opinion that the factors on which the majority rely do not evidence "a consistent pattern of local autonomy in bargaining".

Monopolies . . . Sherman Act . . . tying-in sales of newspaper advertisements . . . newspaper publishing company requiring classified and general advertisers in its dominant morning newspaper, which is only morning paper published in trading area, to take same space in its evening newspaper, which has one competitor, has violated Sherman Act's prohibition against restraints of trade and attempts to monopolize commerce.

■ *United States* v. *Times-Picayune Publishing Co. et al.*, U.S.D.C., E.D. La., May 27, 1952, Christenberry, D. J. (Digested in 20 U.S. Law Week 2605, June 24, 1952).

This was an action filed by the United States against the Times-Picayune Publishing Company, a company which publishes the *Times-Picayune* morning newspaper and the *New Orleans States* evening newspaper, charging defendant company with violating §§1 and 2 of the Sherman Act by entering into advertising contracts which unreasonably restrain trade and attempt to monopolize commerce. The *Times-Picayune* is the only morning paper published in New Orleans, but the *States* newspaper competes with the *New Orleans Item*, another evening newspaper. District Judge Christenberry found that the *Times-Picayune* and the *States* are separate and distinct newspapers, despite their ownership by one company, but the *Times-Picayune* is the dominant newspaper in New Orleans and its trading territory. Because it enjoys a monopolistic position in the morning field and has the combined circulation of both the *States* and the *Item*, Judge Christenberry concluded that "advertisers who desire to cover the New Orleans market must, of necessity, use the *Times-Picayune* as a medium for their advertising".

The Court's opinion then discussed defendant's advertising contracts, which are divided into three principal categories: classified, general and local display. Judge Christenberry noted that since 1935 defendant has required classified advertisers to advertise in the *Times-Picayune* and the *States* as a unit, at combination rates, and has refused to sell such advertising separately. This compulsory unit rate, Judge Christenberry declared, has had the effect of increasing advertising lineage in the *States*, but there was evidence from certain classified advertisers that the *States* had been added to their schedule involuntarily as a result of the unit rule and that they would have placed advertising lineage in the *Item* if the unit rule were not in effect.

As for general advertising, an optional unit rate was adopted in 1940, but in 1950 the rate became compulsory for such advertisers also. As a result general advertising lineage in the *States* increased more than thirty per cent in 1950 over 1949. In connection with this fact, Judge Christenberry stated: "It is impossible, of course, to state with any degree of precision what portion of the increased lineage enjoyed by the States would have gone to the Item but for the forced unit rate. However, it is clear that some general advertisers bought space in the States which they would not have purchased in either afternoon paper, while others bought space in the States which they would have purchased in the Item absent the forced unit rate." A reduced rate has been offered to local display *States'* advertisers based upon the amount of lineage contracted for in the *Times-Picayune*.

From these facts Judge Christenberry concluded that defendants had violated §1 of the Sherman Act. He described the publisher's policy as effecting "tying-in sales" and, with respect to such sales, the Supreme Court has stated that such agreements serve hardly any purpose beyond the suppression of competition, *Standard Oil Co. (Calif.)* v. *United States*, 337 U.S. 293. The publisher's monopoly position was used to force advertisers to purchase what they do not want, space in the evening paper, in order to obtain what they require, space in the morning paper. The opinion observed that "The very fact that the defendant corporation was able successfully to impose the

unit rate on general and classified advertising tended to prove the monopoly position which the Times-Picayune enjoys".

The Court also found that §2's prohibition on attempts to monopolize a part of trade or commerce was violated. It stated: "Defendants . . . by the use of the unit rate device, attempted to monopolize that segment of the afternoon newspaper general and classified advertising field which was represented by those advertisers who also require morning newspaper space and who could not because of budgetary limitations or financial inability purchase space in both afternoon newspapers."

Monopolies . . . fair trade agreements as applied to nonsigners . . . Michigan fair trade law permitting enforcement of fair trade agreements against nonsigners held unconstitutional as violating due process clause of Michigan Constitution.

■ *Shakespeare Co.* v. *Lippman's Tool Shop Sporting Goods Co.*, Mich. Sup. Ct., June 27, 1952, Dethmers, J. (Digested in 21 U.S. Law Week 2020, July 8, 1952).

Although the almost unanimous view on the issue is to the contrary, the Michigan Supreme Court held in this case that the Michigan statute permitting enforcement of fair trade agreements against nonsigners is unconstitutional as violating the due process clause of the Michigan Constitution. All the states which have considered the question, with the exception of Florida, have upheld the constitutionality of similar legislation, as applied to signers and nonsigners of fair trade agreements alike. However, the present Court could not see how application of the act to nonsigners bears a "reasonable relation to public morals, health, safety or the general welfare".

It was argued that the act is a valid exercise of the state's police power because it aims at eliminating "the evils of a price war". However, the Court could not see how a reduction in prices would visit any "destruction or evil" upon the public welfare. Justice Dethmers stated: "Such is not the concept upon which America's competitive economy is developed." A further suggestion was that the act serves "to equalize the uneven race between the small retailer and the large", but the opinion replied that there would be more force to the suggestion if its application was not limited to branded and trademarked goods. The Court remarked that the survival of the small retailer is made just as difficult by the large retailer's cut-rate sales of bulk, unbranded and nontrademarked goods.

Justice Dethmers then noted that *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, held that state statutes making the fixed minimum resale price binding on nonsigners are invalid in so far as they relate to interstate commerce. He stated that the price-fixing scheme considered in this case, although national in scope, depended upon its success for local restraints and he ruled that the local intrastate sales affected interstate commerce, thus coming within the purview of the *Schwegmann* decision.

Justice Butzel concurred in the result reached, but dissented from the holding that the Michigan fair trade act is invalid. He emphasized that there is a considerable body of opinion holding that the use of brand name products for "loss leaders" and destructive price cutting are evils which may be validly regulated under the state's police powers. However, he agreed with Justice Dethmers to the extent that the act cannot be enforced against nonsigners concerning articles sold in interstate commerce.

Justice Reid concurred with Justice Butzel.

Monopolies . . . treble damage action . . . antitrust criminal conviction against major cigarette manufacturers for price-fixing held not admissible in competing manufacturer's treble damage suit to prove conspiracy to exclude competitor from market.

■ *Monticello Tobacco Co., Inc.* v. *American Tobacco Co. et al.*, C.A. 2d, June 19, 1952, Clark, C.J.

In this private antitrust suit for treble damages under §4 of the Clayton Act, plaintiff (Monticello) charged that defendants' violations of the antitrust laws had destroyed its business. Defendants, several major cigarette manufacturers, had been convicted in a criminal action (Lexington action) of violating the Sherman Act. Plaintiff, now defunct, was engaged for a short time in distributing tobacco products and its complaint alleged that wholesale tobacco dealers would not accept plaintiff's products because defendants, in furtherance of the conspiracy for which they were convicted, forced its exclusion from the competitive market.

The Court stated that the basic issue was the extent to which plaintiff could take advantage of the criminal conviction under §5 of the Clayton Act. That section states that such a conviction "shall be *prima facie* evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said [antitrust] laws as to all matter respecting which said judgment or decree would be an estoppel between the parties thereto". The trial judge had admitted the conviction for the limited purpose of showing that defendants had conspired to exclude competition by price-fixing, but at the close of plaintiff's case he concluded that the evidence did not demonstrate that the distributors' refusal to deal with Monticello was caused by defendants. He granted defendants' motions to dismiss on the merits.

On appeal, the Court found that plaintiff had not shown any connection between its business failure and defendants' proved conspiracy; "the mere fact of conviction cannot make the major tobacco manufacturers liable for every business casualty in the cigarette field". The Court remarked that under the Clayton Act private suitors may avail themselves of the results of a criminal antitrust case only in regard to facts "necessarily" adjudicated—whatever de-

fendant would normally be collaterally estopped to deny is established *prima facie* by the admission of a previous criminal conviction. However, the Lexington judgment proved only that defendants charged identical retail prices, the Court declared, and there was no evidence that defendants dictated what brand tobacco distributors could stock and sell. The Court distinguished this case from *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, where plaintiff was an automobile dealer who complained that the manufacturer had driven him out of business by refusing to sell him cars unless he used the manufacturer's own finance company subsidiary. There all the dealer had to show was that his franchise had been canceled in pursuance of this scheme. In this case, however, the criminal judgment established only that the manufacturers were guilty of exerting price pressure upon their dealers and not that they coerced dealers to stock only certain brands.

Motion Pictures . . . censorship . . . exhibition of French motion picture may be barred on ground it is immoral despite Supreme Court decision declaring censorship of motion pictures on ground of sacrilegiousness to be unconstitutional.

▪ *In re Commercial Pictures Corp.* v. *Bd. of Regents of University of New York*, N.Y. Sup. Ct., App. Div., 3d Dept., June 13, 1952, Bergan, J.

The New York Board of Regents refused to license exhibition of the French motion picture *La Ronde* pursuant to a New York statute preventing the licensing of films which are "immoral" or "would tend to corrupt morals". However, the United States Supreme Court recently held that New York could not withhold a license under this statute on the ground that a film was sacrilegious (*Joseph Burstyn, Inc.* v. *Wilson*, 72 S. Ct. 777, 37 A.B.A.J. 532, 928, July, December, 1951; 38 A.B.A.J. 318, 680, 760, April, August, September, 1952) although the instant Court stated that it has no doubt, both from the area that was expressly left open in the *Burstyn* case and from the generally accepted power of a state to deal with matters deemed offensive to public morals, that the licensing statute remains valid to that extent in a proper case. The Court ruled, three to two, that although some "fair-minded" men might find the film immoral and others might not, the Court itself was without power to impose its own view on the Regents and to require by judicial mandate that they license the film. Justice Bergan stated that he was applying the general principle that the judiciary can overturn administrative action only if the administrative decision is not supported by substantial evidence. In this case he did not find "a ground sufficient to warrant interference with the Regents' judgment that 'La Ronde' is immoral".

Presiding Justice Foster wrote a minority opinion in which Justice Brewster joined. He said that since the Supreme Court had held that expression by means of motion pictures is included within the free speech and free press guarantees of the First and Fourteenth Amendments he could not see how a previous restraint in the licensing of motion pictures could be constitutional. He added: "Either motion pictures may be censored or they cannot be. I can see no practical middle ground." The thought was ventured that courts could not apply the general rule regarding judicial review of administrative action to issues involving free expression. Justice Foster said that "It is wholly inconsistent with a constitutional guarantee to leave any debatable issue of morals, involved in any form of protected expression, to the final decision of an administrative agency". The opinion concluded that the litigants "should be entitled to the independent judgment of a competent court after the event".

Shipping . . . government construction subsidies . . . General Accounting Office disapproves Maritime Commission's contract for sale of superliner *S.S. United States* . . . subsidies not supported by "convincing" evidence and based upon misconstruction of Merchant Marine Act of 1936.

▪ *Comptroller General of the United States*, Decision B-58323, May 27, 1952. (Digested in 20 U.S. Law Week 2575, June 3, 1952).

In response to a request by the Secretary of Commerce regarding a decision as to the binding effect of the contract covering the sale of the superliner *S.S. United States*, the Comptroller General of the United States answered that he disapproved the contract and did not believe it to be binding. The facts of the matter are as follows: The Maritime Commission entered into a contract in 1949 with Newport News Shipbuilding and Drydock Company for the construction of the superliner for approximately $70,000,000. At the same time, the Commission executed a contract with the United States Lines Company under which the vessel would be sold to that company for approximately $28,000,000. The difference between the construction cost and sales price would be absorbed by the Government in the form of a construction-differential subsidy and national defense allowance. The question presented was the validity of the latter contract with the United States Lines.

The Comptroller General stated that the strongest basis for refusing to recognize the contract as binding was the Maritime Commission's misconstruction of the term "similar plans and specifications" contained in §502 (b) of the Merchant Marine Act of 1936. That section specifies that the government subsidy shall be the excess of the shipbuilder's bid over the estimate of foreign construction costs, but the Comptroller General believed that the Commission had misconstrued the term with the apparent purpose of increasing the subsidy payable by the Government. In addition, the contract had unlawfully failed to provide for escalation in price to cover construction cost increases. Accordingly, the increased construction cost was not reflected in the sale price for the vessel.

The Commission argued that so

long as the contract made was within the jurisdiction of the agency, its decision was final and conclusive and not subject to review either by the General Accounting Office or the courts. However, the Comptroller General could find no provision in the Merchant Marine Act indicating that Congress had intended such a result. "Millions of dollars could be spent for purposes never contemplated by the Congress and for which no authority was intended." Although §207 of the Act states that the General Accounting Office can disallow credit only in connection with an "unauthorized or illegal" payment, the Comptroller General said that such a limitation could never have been intended to apply to violations of the Act itself. He concluded that "By all logic and precepts of statutory construction, it is not to be concluded that authority which the Congress confers so rarely and so reluctantly upon executive departments with respect to expenditure of public funds was impliedly granted in the field of construction subsidies or national defense allowances, where millions of dollars are involved in each determination".

With regard to the question presented by §502 (b), which expressly limits the granting of construction subsidies in excess of 33½ per cent to "cases where the Commission possesses convincing evidence that the actual differential is greater than that percentage", the Commission had contended that the statutory prerequisite is satisfied if four commissioners testify that the evidence is "convincing" to them. However, the Comptroller General stated that this is a "subjective" standard and he believed that Congress had in mind an "objective" standard; one based upon a finding of "substantial" evidence.

It was also stated that the Commission had abused its discretion in allowing too liberal national defense allowances. The Comptroller General noted: "The policy of the 1936 act is, to be sure, to develop a merchant marine owned and operated by private citizens of the United States . . . . But the Congress never contemplated that vessels would be built primarily for national defense purposes, the major portion of the cost borne by the Government, and title to the vessel conveyed to private owners."

Wills . . . revocation . . . carbon copy of will retained by testatrix for twenty-eight years admitted to probate despite failure to produce original.

■ *In re Mittelstaedt,* N.Y. Sup. Ct., App. Div., 1st Dept., May 6, 1952, Van Voorhis, J., 112 N.Y.S. 2d 166 (Digested in 20 U.S. Law Week 2572, June 3, 1952).

This was an appeal from a Surrogate's decree setting aside a jury's verdict admitting the carbon counterpart of a will to probate, despite a failure to produce the original ribbon copy. The will had been executed in duplicate twenty-eight years previously and both copies were delivered to the testatrix. However, only the carbon copy was found among her effects in a letter file on top of an office desk. The jury had found she did not destroy the original with the intention of revoking her will.

The Court held that, under the circumstances, the failure to produce the other counterpart of the will created "a mere inference of fact" and there is no rule of law requiring production of all counterparts of a will. In the cases cited by the Surrogate the only copy of the contested wills had been produced from a lawyer's files, but in this case a duly executed counterpart had been in the testatrix's possession for twenty-eight years. Although "No case has been cited involving the present facts" the Court found support for its position in *Greenleaf on Evidence* (Vol. 2, §682), which states that if a testator destroys the only copies of his will in his possession an intent to revoke is strongly presumed, but if he was possessed of both copies and "destroys but one, it is weaker". In the opinion of the Court "Such a statement conforms to the probabilities, and, if followed, is more likely to carry out the purposes of testators than a mechanical rule that a will consists of all its counterparts, and that all copies must invariably be produced or accounted for to enable it to be probated as the last will and testament."

Further Proceedings in Cases Reported in This Division.

■ The following action has been taken in the United States Court of Appeals for the Second Circuit (see review *supra*):

ENFORCEMENT OF ORDER DENIED, June 17, 1952: *Bonwit Teller, Inc.* v. *National Labor Relations Board*—Labor Law (37 A.B.A.J. 927; December, 1951).

■ The following action has been taken in the New York Supreme Court, Appellate Division:

AFFIRMED, July 10, 1952: *Harnik* v. *Levine*—Torts (37 A.B.A.J. 847; November, 1951).

Additional Recent Decisions of Interest.

■ *State of North Carolina* v. *Simmington,* N.C., 70 S.E. 2d 842.

Upon conviction for reckless driving court held authorized to suspend execution of sentence of imprisonment on condition that defendant compensate those whom he had injured.

■ *Grasse* v. *Dealers' Transport Co.,* Ill., 106 N.E. 2d 124.

Provision of Illinois Workmen's Compensation Act transferring to employer the employee's common law right of action against third party tortfeasor bound by the Act is unconstitutional.

■ *Board of Commissioners of Mississippi State Bar* v. *Collins,* Miss. S. Ct., 59 So. 2d 351.

The Mississippi State Bar Act is not unconstitutional as a special or local law enacted for the benefit of a corporation, or as a local or private act regulating the practice in the courts of justice and hence Board of Commissioners had right to seek injunction against practice of law by attorney who had been suspended for nonpayment of dues.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

■ The subject of uniform laws has attracted great attention in the United States since the first National Conference of Commissioners on Uniform State Laws was held in 1892. Our readers will be interested to discover from the following article by Professor Orfield that uniform legislation in Scandinavia has a history considerably older than that of the same subject in the United States. Professor Orfield is a former winner of the Ross Essay Contest, is a well-known authority on criminal law and procedure and is the author of a forthcoming book on the growth of Scandinavian law.

Uniform Scandinavian Laws

By Lester B. Orfield, Professor of Law, Indiana University

■ In the United States the first National Conference of Commissioners on Uniform State Laws was held in 1892. The Canadian Conference on Uniformity of Legislation was organized in 1918. The members of the British Commonwealth of Nations have sponsored uniform acts for that group. The Scandinavian states have been no less active in co-operation for uniform laws. The Danish Ambassador to the United States, Henrik de Kaufmann, pointed out in 1950 that in several respects the laws of the Scandinavian states are closer to each other than are the laws of the forty-eight states of the United States. This is not at all strange. When Denmark, Iceland, Norway and Sweden emerged more than a thousand years ago they conceived of their vernacular as one single language, the "Danish tongue", spoken as late as the Viking period from 800 to 1100. The old Icelandic law accorded to "heirs of the Danish tongue" and "men from the three kings' realms where our language is spoken", a privileged position compared to that of other aliens. A Swedish provincial code of about 1200 provided for a higher penalty for the manslaughter of a Dane or Norwegian than the killing of an Englishman or German. Finland was a part of Sweden for the six centuries prior to 1809. Iceland was a part of Norway from 1262 and later of Denmark until 1918. There was a personal union between Norway and Sweden from 1319 to 1371. Norway and Denmark were united from 1380 to 1814 and from 1536 Norway was in effect a province of Denmark. Denmark, Norway and Sweden were united under a common king from 1389 to 1521. This union also embraced Finland and Iceland. From 1814 to 1905 there was a union between Norway and Sweden, and from 1918 to 1944 one between Denmark and Iceland. Danish law has strongly influenced that of Norway and Iceland. Swedish law has had a similar influence in Finland. It is not surprising that a leading Swedish lawyer has recently remarked: "A like example of advanced co-operation in adoption of uniform laws among several independent states is not to be found anywhere else in the world."

Scandinavian Jurists' Conventions have been held usually every third year for eighty years since the first was held at Copenhagen in 1872. The eighteenth conference, held after an interval of eleven years, met at Copenhagen in 1948. The nineteenth met at Stockholm in 1951. There are also periodical sessions of the Scandinavian Inter-Parliamentary Union organized in 1907 and the Scandinavian ministers of justice. The uniform acts are not treaties, hence each state is free to alter the acts. In some instances co-operation is secured through treaty.

The Scandinavian Monetary Convention of 1872, which lasted until its disruption in 1914 by the World War I, provided common names and common values for Scandinavian money. The money of each state was legal tender in the other. The Bank Drafts Act of 1880 achieved better coordination of the law governing bank drafts. An identical bill was passed in Denmark, Norway and Sweden after a joint committee of the three parliaments had agreed on the texts. Among important common codifications are the Navigation Act of 1892, the Bank Check Act of 1897, the law of Purchase and Selling of 1905-1907, the 1917 acts on Contracts, Commissions, Commercial Agencies, Commercial Travelling, and Hire and Purchase, the Marriage and Divorce Law of 1918-1925, the Insurance Act of 1931, the Bankruptcy Act of 1935, and laws regulating trademarks, trade registers, various aspects of property and air traffic. A law concerning corporations is being prepared. During World War I identical regulations as to neutrality were adopted. Some states have adopted common regulations from a 1922 act as to minority and guardianship and also as to certain aspects of legacy. Basic principles have been worked out as to juvenile delinquency, alcoholism and abortion. Denmark and Sweden have almost identical laws as to citizenship.

Major criminals are, of course, subject to extradition. Recently it has been thought that lesser offenders should be provided for. Hence a bill is in preparation to make it possible to recover fines and execute short-term prison sentences imposed by a court of one Scandinavian country in all the other countries. Special arrangements were made to prevent Danish and Norwegian quislings from finding refuge in the other Scandinavian states.

In civil cases judgments of one Scandinavian state may be executed in another. Denmark and Sweden made a convention to that effect in 1861, later adhered to by Norway.

For the last forty-five years social legislation has been a topic of co-

operation. Social agencies of Denmark, Norway and Sweden met in 1907 to discuss workmen's compensation. Since World War I the ministers of labor and social affairs have met every two or three years. A primary objective has been to obtain reciprocity, so that nationals of one Scandinavian state living in another could receive the same benefits as the citizens of the latter state. There has been co-operation as to administrative problems and exchange of information and experience. Old age pensions and disability insurance have not as yet been coordinated. Reciprocity was first extended in 1919 to industrial accident insurance. In 1937 all five states concluded a new convention to apply to cases in which the incapacitated worker was not a resident of the state of injury. Since 1926 there have been conventions on health insurance, enabling members of an approved health insurance society in one state to be transferred to a similar society in the other regardless of age or health. There has been some but less co-ordination as to unemployment insurance because of differences in the statutes of each state. Since 1946 transference between Danish and Swedish unemployment insurance societies has been possible. Under the Scandinavian Pauper Convention of 1928, Scandinavian nationals acquire the right to public assistance in any Scandinavian state on certain conditions when they have lived there for a certain period. An accounting between states is then made at the end of each fiscal year.

By a convention of 1931, common rules of conflict of laws were adopted as to marriage, adoption and guardianship. Previously in Denmark and Norway, conflict of laws looked to domicile, whereas in Finland and Sweden it looked to nationality. As to inter-Scandinavian matters, the convention adopts the principle of domicile. A convention of 1934 extended the principle of domicile to succession, wills and administration.

A draft for new and uniform legislation as to the citizenship of married women worked out by delegates from Denmark, Norway and Sweden, was submitted simultaneously to the parliaments of the three states in 1950, effective January 1, 1951. Marriage does not automatically confer citizenship, but it must be applied for. A woman citizen marrying an alien may retain her citizenship though she lives in her husband's state. Women who have lost their citizenship through marriage may regain it by a declaration made within five years from the date of enactment. Children born in wedlock will have the father's nationality; otherwise the mother's. If the father is stateless, they will have the mother's nationality.

Following World War II the Scandinavian states were eager to resume work on uniform laws. At meetings held in Copenhagen and Stockholm in 1946, it was agreed that political considerations made it undesirable to consider common Scandinavian citizenship. But the acquisition and loss of national citizenship might be considered. Work on air law should be continued. Ten topics were deemed ripe for codification: (1) torts, especially where automobiles are involved; (2) responsibility of the central government and the locality for torts of their employees; (3) prescription; (4) revision of the law of sales; (5) creditors' rights; (6) bail with respect to criminal proceedings in another Scandinavian state; (7) mortgages; (8) separation agreements; (9) the law of names; and (10) citizenship. At a meeting in Oslo, Finland and Iceland were invited to join in the work. It was decided that the first subject to be taken up would be purchases on credit, then responsibility for torts of government employees. Other subjects to receive later consideration were prescription, sales, arbitration agreements and the law of names. It was proposed that each state appoint two or three persons to engage in codification. There was much discussion of a more effective and stable method of co-operation in common codification. In 1948 Professor Vinding Kruse of the University of Copenhagen published a book of 626 pages entitled *A Scandinavian Law Code: Plan for a Common Law Code for Denmark, Finland, Iceland, Norway and Sweden*. The plan is divided into six parts: general, the law of persons, family law, inheritance law, property and creditors' rights. Comments on this plan in the Scandinavian law periodicals indicate agreement with much of it, but considerable skepticism as to whether so broad a code is feasible or desirable.

There has been co-operation in the organizational field. The Norden Society sponsors cultural activities and exchange of students and economic co-operation. Following World War I the Scandinavian Wholesale Society was organized with its central office in Copenhagen to serve as chief purchaser for the national co-operative societies. On November 8, 1950, the transport ministers of Denmark, Norway and Sweden reached full agreement on merging the three Scandinavian air lines into a joint consortium.

Following World War II there was a movement to unite the Scandinavian states for the maintenance of peace and neutrality. In January, 1949, Sweden offered Denmark and Norway a ten-year military alliance. But Norway thought such protection not adequate and proposed that the three powers seek a unilateral American guarantee and that if such guarantee was obtained, the three states should enter into immediate military conversations to make it effective. But this proposal was not acceptable to Sweden. Denmark followed Norway in adhering to the North Atlantic pact as original members. Iceland also signed the pact. Finland, fearing Russia, has not become a member. Sweden too has abstained, fearing that her entrance might lead to a Russian invasion of Finland.

Since 1863 the idea of a Scandinavian Customs Union has been discussed. Denmark and Sweden have been more receptive to the idea than Norway. Norwegian representatives have pointed out that capital deterioration during World War II and

postwar concentration on export industries have placed Norway's domestic consumer industries in a very exposed position. Since the Scandinavian economies do not supplement each other the movement is not likely to make great progress. Recently there has been a movement for a passport union. Hand baggage would be made free from duty. Money restrictions at the border would be abolished and confined to control through the banks. Only Scandinavian citizens would come within the scope of the system and Finland would not participate at first.

First the Danes and then the Swedes have proposed the establishment of a Scandinavian Parliamentary Council. The Scandinavian Inter-Parliamentary Union recently named a five-nation committee to report on the proposals. Former Prime Minister Hedtoft of Denmark pointed out that the Council of Europe at Strasbourg had shown that there should be a closer liaison between the parliaments and ministers of the European countries. Finland has rejected the proposal because of fear of Russia. Denmark, Iceland and Sweden have unequivocally favored the proposal. The minority parties in Norway are opposed, but a majority of the Labor party favor it. The committee appointed in August, 1951, at Stockholm proposed a council to prepare, co-ordinate and advise on legislation and procedure in matters of common interest. But no superparliament would be established. Among other things the Council would obtain equal facilities for Scandinavians traveling or working in each other's states. Denmark, Norway and Sweden would each have sixteen delegates and Iceland, five. All political parties would be represented, and the prime minister and foreign minister would attend. Annual sessions would be held, rotating among the capitals, and a permanent secretariat would be established in each capital. Subject to parliamentary approval the first session would be held in 1952. On March 16, 1952, the Scandinavian foreign ministers meeting at Copenhagen favored a council. On May 7, 1952, the Danish foreign minister submitted a bill to the Danish parliament for the establishment of a permanent Scandinavian parliamentary council.

Manuscripts for the *Journal*

■ The JOURNAL is glad to receive from Association members any manuscript, material or suggestions of items for consideration for publication. With our limited space we can publish only a few of those submitted, but every article we receive is considered carefully by members of the Board of Editors unless for some reason it is plainly unsuited for our publication. Articles in excess of 3000 words including footnotes cannot ordinarily be published; exceptions are sometimes made as to solicited contributions. The facts stated and views expressed in any article identified with an individual author are upon his responsibility.

Manuscript must be typewritten originals (not carbon copies) and must be double or triple spaced, including footnotes and any quoted matter. The Board of Editors will be forced to return unread any manuscript that does not meet this requirement.

As the work of the Board of Editors is carrried on by men who are widely separated in distance and busy in their own professional pursuits, time often elapses before a decision can be made as to whether a proffered article is acceptable and space can be made available for it. We cannot assure that submitted manuscripts not accepted will be returned, although that may usually be done. Because of the small size of the JOURNAL staff, unsolicited manuscripts cannot always be immediately acknowledged, although every effort will be made to do so. A period of four or more weeks is usually required for consideration of material; some manuscripts may require more time for consideration because of the nature of their subject matter.

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Harry K. Mansfield, Chairman.

Is the Cost of Attending a Tax Forum Deductible?

■ The expenses of attending a university-sponsored tax forum are not deductible by a practicing lawyer, according to a recent Tax Court decision. *George G. Coughlin,* 18 T. C. No. 64 (1952). The taxpayer in this case was a lawyer who had been engaged in practice since 1922. His practice, while general in nature, included federal tax matters. The firm in which he was a partner regularly subscribed to tax publications, services, etc. He was expected by his partners to keep up with changes and developments in the law. In line with this, he had been attending lecture series given by his local and other bar associations for the purpose of keeping practitioners abreast of current developments.

In 1946, the taxpayer attended the "Fifth Annual Institute on Federal Taxation" conducted in New York City under the sponsorship of the Division of General Education of New York University. The Tax Court stated as a fact that the Institute "was aimed specifically at people who had tax work and who knew something about taxes. Students were warned away on the grounds that the Institute was not designed for their benefit." The Institute "was designed by its sponsors to provide a place and atmosphere where practitioners could gather trends, thinking and developments in the field of Federal taxation from experts accomplished in that field." On his 1946 return, the taxpayer deducted as an ordinary and necessary business expense the tuition fee and the travel and lodging expenses incurred.

The Commissioner disallowed this deduction on the theory that the item was actually a nondeductible personal and educational expense. Section 24 (a) (1) of the Internal Revenue Code. His position was based on a 1921 Bureau ruling which stated without any details, explanation or qualification, that "Expenses incurred by doctors in taking postgraduate courses are deemed to be in the nature of personal expenses and not deductible." O. D. 984, 5 Cum. Bull. 171 (1921). The Tax Court upheld the Commissioner's disallowance of taxpayer's forum expenses. In support of its conclusion, it quoted as follows from Mr. Justice Cardozo: "Reputation and learning are akin to capital assets, like the good will of an old partnership . . . . For many, they are the only tools with which to hew a pathway to success. The money spent in acquiring them is well and wisely spent. It is not an ordinary expense of the operation of a business." *Welch* v. *Helvering,* 290 U. S. 111 (1933).

The taxpayer relied upon *Hill* v. *Commissioner,* 181 F. (2d) 906 (4th Cir. 1950), rev'g 13 T.C. 291 (1949), in support of his deduction. There, a school teacher's expenses of attending a summer course were held deductible as ordinary and necessary business expenses because she needed the additional college credits in order to keep her existing teaching job. However, the Tax Court disposed of the *Hill* case summarily by pointing out that the Circuit Court had specifically limited its decision to the facts of that case.

Regrettably, the Tax Court's opinion fails to bring the problem of the *Coughlin* case into clear focus. The problem arises against a background of two divergent lines of tax authority. One deals with the cost of acquiring additional schooling. That has quite generally been considered a nondeductible personal expense of education (*Welch* v. *Helvering,* 290 U. S. 111 (1933); O. D. 984, 5 Cum. Bull. 171 (1921); I. T. 4044, 1951-1 Cum. Bull. 16; *T. F. Driscoll,* 4 BTA 1008 (1926)), even though the result would be to qualify the student for a new post, a better post or a more profitable practice of an existing profession.

On the other hand, there is a clear line of authority upholding deductions for the cost of membership in professional societies and the cost of professional periodicals and technical books, either currently or through depreciation. I. T. 3448, 1941-1 Cum. Bull. 206; O. D. 785, 4 Cum. Bull. 130 (1921); G. C. M. 11654, 1933-1 Cum. Bull. 250. Even more to the point, business expense deductions have been allowed to lawyers, physicians, teachers and ministers for the cost of attending professional conventions (*Wade H. Ellis,* 15 BTA 1075 (1929); *Robert C. Coffey,* 21 BTA 1242 (1931); *Alexander Silverman,* 6 BTA 1328 (1927); *Marion D. Shutter,* 2 BTA 23 (1925)), to singers for the cost of professional coaching (*Frieda Hempel,* 6 T.C.M. 743 (1947); *John Charles Thomas,* CCH Dec. 10,622-A (1939)), and to actors for the cost of keeping in condition for a particular job (*Charles Hutchison,* 13 BTA 1187 (1928); *Reginald Denny,* 33 BTA 738 (1935)).

The real issue, then, was into which category to throw a type of expense which may have some of the characteristics of both categories. Unfortunately for the taxpayer, certain statements made by New York University in connection with its forum militated strongly against his using the professional convention line of authority. The Commissioner's brief pointed out that the school described its forum as a university course, not a convention. Those in attendance were to consider themselves students. Also, the brief suggested that the taxpayer was not a

tax specialist although he had been in practice for many years, and attributed his attendance at the forum to a need for acquiring a body of tax knowledge.

Suppose, however, that the New York University authorities had not made the statements attributed to them, or, in the alternative, that those attending the forum considered it a convention of professional men and did not think of themselves as students, despite what New York University may have said. This latter alternative is particularly the case with some persons who attend the New York University Institutes several times. It would then become increasingly difficult to distinguish this forum from other meetings or conventions with respect to which the cost of attendance has been held a deductible business expense. For example, consider the language of the Board of Tax Appeals in upholding a chemistry professor's right to deduct the cost of attending scientific meetings and conventions. He had "to keep abreast in his particular field of work and in touch with other scientists in the same field, which was done among other ways by . . . the attendance at such conventions where consideration of subjects of a scientific nature were presented and discussed". *Alexander Silverman, supra.*

Because of the taxpayer's previous lack of experience with taxes in the *Coughlin* case, the Commissioner has some precedents for his position. Thus, while the cost of taking music lessons in anticipation of becoming a professional singer was held to be a personal expense which could not be deducted as a loss after a decision to abandon the musical career *(T. F. Driscoll, supra),* established singers have been allowed a business expense deduction for the cost of their vocal coaches. *Frieda Hempel* and *John Charles Thomas, supra.* The basic question in the *Coughlin* case may be only whether a lawyer is sufficiently qualified taxwise so that a tax forum is merely a refresher or a means of keeping in contact with developments in the field, rather than a method of acquiring a new body of knowledge. Even if this should be so, it is doubtful if revenue agents will so limit it.

The arguments made by the Commissioner may have been based on precedents, but they may lead to strange results if carried to their logical conclusion. For example, consider a series of tax lectures given as part of a bar association meeting. Presumably the decisions and rulings on professional meetings would support a deduction for the entire expenses of attending the bar meeting. Would this rule be limited by denying a deduction to those lawyers who might not be considered tax experts for any expenses directly allocable to attending the tax lectures? That hardly seems likely. In spite of the *Coughlin* case, symposia and forums held in conjunction with and as a part of regular meetings of professional associations may not be challenged by the Commissioner. On the other hand, expenses of attending a separate course of tax lectures sponsored by a school jointly with a professional association may be subject to the *Coughlin* case; if so, they would not be deductible, except possibly by the tax experts attending. In between, perhaps, is the case of a course of lectures sponsored by a bar association as a special service independently of its regular meetings.

If the *Coughlin* case turns only on the purpose of the course of lectures, that is, upon its over-all educational and training aspect, then there would be a single decision for all attending, turning upon the general purpose of the course. But if the case turns only upon the purpose of the individual attending, then the decision must be made separately for each individual, depending upon whether he was acquiring additional knowledge or merely refreshing his knowledge. The former possibility seems to be opposed to the cases with respect to professional coaching of singers. The latter possibility leads to the requirement of a depressing multitude of separate decisions based upon a difficult assessment of individual fact situations.

It looks as though the Commissioner and the Tax Court have worked themselves into a difficult position in the *Coughlin* case. In view of the enormous growth of the tax law in the last ten years, and the corresponding nation-wide development of tax seminars, courses, etc., for professional men, it might have been a more practical policy for the Commissioner to accept these facts and to allow the deduction in all cases and thus avoid needless litigation.

The *Coughlin* case did not take up the problem of a lawyer who is an employee of a law firm and attends a tax forum either voluntarily or at the request of the firm. If his expenses are reimbursed by the firm, they would presumably be taxable income to him. This would seem to follow from an early Bureau ruling that an accounting firm's expenses of sending juniors to school were additional compensation to the juniors (I. T. 1304, I-1 Cum. Bull. 72 (1922)), and from a social security ruling that an employer's reimbursement to an employee for night school expenses constituted wages for social security purposes (S. S. T. 193, 1937-2 Cum. Bull. 450).

If the employee is required to attend the tax forum, the amount considered compensation to him should be deductible under the *Hill* case, presumably as a reimbursed expense of employment. Also, if the employee is required to attend and pay his own expenses, a deduction should be allowed under the *Hill* case. But if the employee voluntarily attends the tax forum, the *Coughlin* case could be authority for disallowing him a deduction for his expenses.

The law firm which pays its employees' expenses of attending a tax forum should be able to deduct them as additional compensation, or as expenses in the nature of cost of training apprentices. I. T. 3403, 1940-2 Cum. Bull. 63.

Contributed by committee member Leon Gold

THE DEVELOPMENT OF INTERNATIONAL LAW

Richard Young • Editor-in-Charge

The International Control of Narcotic Drugs

■ The need for continuing and effective measures of international action is nowhere more obvious than in the control of dangerous narcotic drugs. No one nation can reach all the places of drug production or adequately police the world-wide channels of distribution. The problem has long been recognized as one of universal concern and it has been the object of international legislation since 1912. Under the auspices of the League of Nations, a notable measure of success was achieved in the period between the two World Wars. Today, however, new developments have increased the difficulties of adequate regulation and there may be some reason to fear that the forces of control have been falling behind in the struggle.

The United Nations Commission on Narcotic Drugs, which held its seventh session in New York in the spring of this year, concluded from reports laid before it by thirty-nine governments that there had been a "dangerous increase" during 1951 in the illicit traffic in narcotics. It noted, for example, that 224 different ships figured in drug seizures reported, as compared with only 124 in 1950. Of those involved in 1951, ninety-one were of United States' registry, forty-three British and fourteen Dutch. Smuggling by airplane was also brisk.

Effective control is to some extent handicapped by the complexities of existing international legislation on the subject. No fewer than eight different international agreements, dating from 1912 to 1948, govern international action regarding narcotics. Each new agreement represented a step forward at the time and the record of progress has been noteworthy; but the multiplicity of instruments has meant both gaps and overlaps in the enforcement system, and somewhat cumbrous administrative arrangements. Most difficult of all, the states which are parties vary from instrument to instrument, with a resulting lack of uniformity in their obligations and an impairment of effectiveness.

The six major instruments currently in effect are:

1. *The International Opium Convention signed at The Hague on January 23, 1912.* This basic instrument, to which some sixty-nine states had become parties by 1950, obligates the parties to take measures to control opium and opium products and to limit to medical and legitimate purposes the manufacture and use of morphine and cocaine. The United States, one of the first three countries to accept the convention, has been bound by it since 1915.

2. *The International Opium Convention signed at Geneva on February 19, 1925.* This convention, drawn up under League of Nations' auspices, was designed to tighten up the 1912 agreement and to extend regulation to additional substances, such as coca leaves and marijuana. It established a system of import and export authorizations to be issued by the co-operating governments, without which narcotics could not be lawfully moved in international trade, and placed the trade under the eye of an international watchdog group, the Permanent Central Opium Board. The Board was given extensive powers of inquiry and a power to recommend that narcotic exports to any country be suspended should the Board not be satisfied with the drug situation there. Some fifty-six states were parties to this convention by 1949. The United States, though not a party, has collaborated in the work of control and United States nationals have served on the Board since 1928.

3. *The Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, signed at Geneva on July 13, 1931.* This agreement provides for the limitation by each participating government of narcotics manufacture within its territory to an amount not greater than its estimated requirements for domestic use and legitimate foreign markets. The estimate is prepared each year by each government and is reviewed by an international expert committee known as the Supervisory Body. The estimates, once fixed, are binding for the year, and the Permanent Central Board is charged with seeing that they are not exceeded; if they are, the Board has power to embargo further exports by the parties to the country at fault. To insure world-wide effectiveness in so far as possible, the Supervisory Body is also directed to make estimates for countries not supplying them, whether or not those countries are parties to the convention; these estimates are binding on the parties, so that a nonparty state which exceeds the estimate made for it may be barred from obtaining further supplies from any of the parties. By 1950 some seventy-two states were parties to this convention, the leading exceptions being Bolivia, Iceland and Liberia. The United States has been a party since 1932.

4. *The Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, signed at Geneva on June 26, 1936.* This convention was designed to promote the establishment of substantially uniform penalties for illicit trafficking, and to facilitate the apprehension, punishment and extradition of traffickers. By 1949, thirteen states, not including the United States, were parties to this agreement.

5. *The Amending Protocol signed at Lake Success on December 11, 1946.* This instrument made the necessary arrangements for incorporating within the framework of the United Nations the machinery set up in the prior conventions and connected with the League of Na-

tions. Thus the role assigned to the Council of the League was taken over by the Economic and Social Council, and the old League advisory committee on opium and dangerous drugs was succeeded by the UN Commission on Narcotic Drugs. The Permanent Central Opium Board and the Supervisory Body were carried over unchanged into the new establishment.

6. *Protocol bringing under international control drugs outside the scope of the 1931 convention, signed at Paris on November 19, 1948.* This agreement, aimed especially at new and potentially dangerous synthetic drugs, provides a method for bringing new types of narcotics under the controls established by the 1931 convention.

In addition to the foregoing six instruments, two other multilateral agreements are in effect which deal with the more effective control of opium-smoking in the Far East: the Geneva Agreement of February 11, 1925, and the Bangkok Agreement of November 27, 1931. These agreements were signed by eight and seven states respectively, all of which were particularly concerned with this regional problem.

The system of control built up by this body of international legislation is based on the theory that world production of dangerous drugs should be limited to the amount necessary for medical and scientific purposes. Two main techniques have been developed in seeking this objective. First, governments are bound to limit manufacture within their territories to the quantities needed for legitimate domestic use or for legitimate export and their estimates of these quantities are subject to review by an international body. Second, the international trade in narcotics is controlled by the requirement that all imports and exports be made under permits issued by the governments of both the importing and the exporting states. This traffic also is subject to investigation by an international body. The chief sanction behind the regulations is the power of the international body to order an embargo on shipments to states held to be at fault. Since the great majority of states are bound by the control system, this possibility has not been an empty threat.

The effectiveness of the regime thus established was demonstrated in the years between 1928 and 1938. Statistics of the League of Nations show that in 1928 over 36,000 pounds of the three principal narcotic drugs moved in international trade: some 15,000 pounds of morphine, 14,000 pounds of heroin and 7,000 pounds of cocaine. It was known that almost all the heroin, in particular, went into illicit use. In 1938 only a little over 6000 pounds of all three drugs were moved: some 4000 pounds of morphine, 300 pounds of heroin and 1800 pounds of cocaine.[1] The record is undeniably one of the brightest pages in the history of the League's activities.

Since World War II, however, new difficulties have come to the fore. Some are scientific in origin, arising from new discoveries in the field of synthetic narcotics. These developments not only add to the number of drugs requiring control; they also point the way to the cheap and rapid manufacture of dangerous narcotics from substances not in themselves injurious and not connected with the natural sources of the older drugs. The bringing of new synthetics within the established control regime has been provided for by the 1948 Protocol; but the redesigning of the control techniques themselves, to deal adequately with laboratory-produced substances, is a problem yet to be solved.

The other main group of postwar difficulties is of a political character, reflecting the split between the non-Communist nations and the Soviet bloc. The Soviet Union is a party to the agreements of 1925, 1931, 1946 and 1948, and all of the states within its sphere of influence are likewise parties to at least two of the principal conventions. They appear to have co-operated in the routine activities carried on under these instruments, and their representatives take part in international discussions of the problem. As might be anticipated, these representatives (like Professor Zakusov, of the U.S.S.R., at the 1952 session of the UN Commission on Narcotic Drugs) have shown a fondness for speeches asserting that "in all countries where the social organization had been reformed, drug addiction was unknown". Despite their formal participation, the secretiveness of governments beyond the Iron Curtain and their disinclination for international co-operation are bound, to say the least, to create some obstacles to the functioning of a supposedly world-wide control system.

More serious is the possibility that Communist regimes may make use of narcotics as a weapon for furthering their interests. International controls based on the good faith of participating governments are bound to suffer in such a case, which is perhaps not as unlikely as one could wish. According to the United States Government, there is evidence that the present Chinese Communist regime has resorted to such methods. At the 1952 UN Commission meeting, Commissioner Harry J. Anslinger, of the Federal Bureau of Narcotics, reported that shipments of heroin seized in Japan during 1951 had been traced to Communist China. According to information received, he declared, opium poppies were being grown on a large scale in the province of Jehol and heroin was being manufactured in Tientsin; the heroin was then collected and smuggled abroad under the direction of the Central Financial and Economic Committee in Peiping.

Despite such problems as these, some steps are being taken to meet the need for improved international controls. On the scientific side, improved methods of drug analysis have been developed: these make it possible, for example, to determine the probable place of origin of seized opium from variations in its crystalline structure. On the side of expanded coverage, special attention is

1. These figures are based on data from official sources cited in B. A. Renborg, *International Drug Control* (1947) page 97.

being given to the habit of coca-leaf chewing, which is particularly prevalent among some Indian inhabitants of Peru and Bolivia. On the policing side, the Narcotic Drugs Commission in 1952 approved the compilation by the UN secretariat of a list, to be circulated to all governments, of merchant seamen and air crew members convicted of offenses against narcotic laws. Such a list, it was believed, would facilitate the identification of habitual smugglers and the Commission urged all governments to take steps to deny to such persons the seamen's or airmen's papers which enabled them to serve as couriers.

Perhaps most important of the steps now under consideration is the effort to consolidate into a single comprehensive convention the various international instruments described above. Such a convention, which would be a work partly of codification and partly of new legislation, would be designed to simplify existing control machinery; to promote uniformity of obligation on the part of the participating states and to take account of new developments. Such an instrument must necessarily be elaborate in its provisions and it cannot be framed in acceptable form overnight. A draft prepared by the UN secretariat has been under examination by the Narcotic Drugs Commission for the past two years; by the end of its 1952 session, the Commission had completed work on twelve of the fifty-one sections. It may be anticipated that a single convention will eventually be approved and recommended for general adoption, but this may not come to pass for another two or three years.

One final word may be said about the position of the United States in relation to international narcotics control. The record of the United States in this field has been good. It is a party to the important conventions of 1912 and 1931, as well as to the postwar agreements of 1946 and 1948, and it has taken an active part in the suppression of the illicit international traffic. In pursuance of its international obligations and its own domestic welfare, the United States has enacted a number of statutes, the most notable in the present connection being the Opium Poppy Control Act of 1942.[2] That act, passed for the declared purpose of discharging more effectively the obligations of the United States under the 1912 and 1931 conventions, forbids the production of the opium poppy save under license granted by the Secretary of the Treasury.

In 1944 certain unlicensed poppy growers in California, whose crops were threatened with destruction by the federal authorities, challenged the act as an attempt to regulate, without constitutional authority and in contravention of the Tenth Amendment, the production of an agricultural commodity within a state.[3] It appeared that the poppies were being grown for their seeds, a non-narcotic food product, and that their character as a potential source of opium was wholly coincidental. The three-member court, per Welsh, D.J., declared that the constitutionality of the act depended not on any congressional power to regulate a food product, but on congressional power to regulate supplies of raw opium; the effect of the regulation on a food product was only incidental. It then found the act constitutional as an appropriate method for Congress to adopt for performing obligations properly entered into under the treaty-making power:[4]

> The competency of the United States to enter into treaty stipulations with foreign powers designed to establish, through appropriate legislation, an internationally effective system of control over the production and distribution of habit forming drugs is not questioned. The obligations of the United States incurred as a party to the two conventions heretofore mentioned [of 1912 and 1931] were lawfully undertaken in the proper exercise of its treaty making power. And Congress is constitutionally empowered to enact whatever legislation is necessary and proper for carrying into execution the treaty making power of the United States.

The case might well have gone the other way had there been in effect at the time an amendment to the Constitution, such as some currently under discussion, restricting the treaty-making power to subjects within the delegated powers of the Federal Government. Such a restriction might gravely impair effective American participation in the international narcotic control system so painstakingly built up over forty years. The problem was thus put by Acting Secretary of State Bruce in testifying before a Senate subcommittee on May 27, 1952:[5]

> It is not necessary to emphasize the gravity of the social problem of illicit traffic in narcotic drugs in the United States. The daily newspapers headline that. Here is an international problem of first magnitude. We know that the United States is the object of the illicit international traffic in narcotics. We have reported to the United Nations this year that the principal sources of illicit raw opium in the United States are India, Turkey, Iran and Mexico. Heroin has been coming in illegally from Italy, although following the action of Italian authorities in curtailing the manufacture of heroin there has been a noticeable lessening of available supplies of illicit heroin. Most of the illicit marijuana seized here came from Mexico and was confiscated on the Mexican border and the Pacific coast. The Mexican authorities are endeavoring to stamp out the illicit production of marijuana. Clearly, however, we cannot expect other governments to cooperate in this international effort to suppress illicit manufacture of narcotic drugs, if we do not take similar measures with our own citizens.

The foregoing review of one field in which international legislation has been both essential and reasonably successful over a substantial period suggests that steps which might impair the efficacy of such international measures should not be taken lightly. It may be possible, on a balance of all considerations, that such steps may still appear desirable. But it seems clear that they should not be taken in ignorance of the impact they may have on international arrangements, the benefits of which are not always well known or fully appreciated.

2. 56 Stat. 1045, 21 USCA, Sec. 188 *ff.*
3. *Stutz v. Bureau of Narcotics*, 56 F. Supp. 810 (N. D., Cal., 1944).
4. 56 F. Supp. at 813.
5. Department of State Press Release No. 417, May 27, 1952.

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

Thinks Bar Should Honor Judge David A. Pine

■ Today I should like you to give consideration to an idea of mine which I have been tossing around in my head ever since the United States Supreme Court upheld the decision of the District Court which voided President Truman's steel seizure order. It goes without saying that the Supreme Court's decision is a great victory for constitutional government. It definitely checks the trend towards absolutism.

Undoubtedly the Supreme Court ought to be given credit in large measure for what I am sure will be considered by future historians as one of the most important decisions ever rendered by the tribunal.

On the other hand, it seems to me that the Supreme Court in turn is indebted to District Court Judge David A. Pine, in so far as, in affirming Judge Pine's decision, it has adopted the philosophy of Judge Pine and also followed his line of judicial reasoning. I believe, then, that if the trend towards the establishment of a dictatorship here in this country has, at least temporarily, been stopped by the judiciary, even greater credit should be given to Judge Pine. I, therefore, respectfully submit the following idea: To consider whether the legal profession in this country should not in some appropriate manner express its appreciation to Federal Judge David A. Pine for the outstanding service which he rendered to the cause of upholding the ideal of constitutional government, the rule of law rather than government by arbitrary men, in short, all those fundamental concepts on which this republic has been founded.

WILLIAM FLEMING

Ripon College
Ripon, Wisconsin

An Amendment Needed in the Social Security Law

■ The following problem of humanitarian interest has arisen relating to the Social Security Law.

Upon reaching retirement age, a clerical worker is out of employment and must readjust his way of living. He is entitled to social security payments of $80 per month; his wife will soon be entitled to receive social security payments of $40 per month; and from other sources, they have dependable monthly income of approximately $40 per month. Although the situation is not acute, yet, with one elderly dependent they need additional income of about $140 per month to maintain a reasonably suitable standard of living.

The difficulty is that if he and his wife earn the needed $140 per month, they will lose their combined social security payments of $120 per month. Considering that it is not easy for an elderly person to obtain new employment, he would like to know why the law should make his problem more difficult by penalizing him, in effect, for continuing to work. Is it against the public interest for an older person to engage in gainful activity?

Unless he decides to forego his right to social security payments entirely, the only course open to him seems to be either to drastically reduce his standard of living or to remove to a foreign country and seek gainful employment. Not until he reaches the age of 75 years will he be permitted, without penalty, to engage in gainful activity in his native country.

Naturally, he feels that the Social Security Law is unjust. Especially so, in view of the fact that unearned income, however large, does not cause the recipient to lose social security payments. It is usual for recipients of pensions to be able to supplement their pension income by earnings. Why is social security an exception?

Although circumstances differ with various individuals, the case above stated is representative of a multitude of cases. I have heard employees in my own office say that the Social Security Law is of special benefit to the well-to-do. Those who need it most cannot live on it and so must continue to work. Thus, not only must they forfeit their own benefits, but they must also pay more taxes to cover the social security payments to a more fortunate class of persons. With its present provisions denying benefits to persons between the ages of 65 and 75 who continue in gainful activity, the Social Security Law is a burden rather than a benefit to a large class of most deserving low-income individuals.

Can anyone suggest a plausible answer to this criticism? If there is one, I have not heard it.

PIKE P. WALDROP

New York, New York

The *Fujii* Case and the Treaty Clause

■ The untiring work of Frank Holman to acquaint the Bar with the effect upon our Constitution of the United Nations' Charter is ably supported by the article of George A. Finch in the June issue.

On April 17, 1952, the Supreme Court of California in the case of

Sei Fujii v. *California*, 38 A.C. 817, held the Alien Land Act of California invalid upon the ground that it violated the Fourteenth Amendment. However, the argument was made in the case that the Act violates the United Nations' Charter. The court held that the Charter was not involved since, in the absence of specific provisions, rather than generalities and moral commitments, the court could not hold the provisions of the Charter sufficient to outlaw the statute. The case is very interesting in its implied holding that the Charter could have been so drawn as to sweep away every safeguard set up by the Constitution.

WALTER C. FOX, JR.
San Francisco, California

Opposes Intoxicants at Bar Meetings

■ A lawyer who has been in the practice over fifty years has seen many changes in the profession, some of which are encouraging and some discouraging.

As one who has a very high opinion of the profession and most of its members and who has thoroughly enjoyed the fellowship he has had with his fellow attorneys in conversations in the office, contacts in the courtrooms, and in county, district and state bar meetings, I am impressed that the use of intoxicants to excess at the various bar meetings is on the increase. This some of us deplore.

It is my belief that when I was licensed drinking among the lawyers was all too common and that later it was much more rare. Now it seems that drinking, and even drunkenness, at bar meetings, is becoming much more common again.

It is no pleasure to attend meetings where attorneys one likes and, in general, respects get drunk and make ridiculous spectacles of themselves. Nor does this inspire respect for the profession in the minds of the public.

Would it be asking too much of bar meetings that the cocktail hour and other drinking practices be omitted? There are some lawyers, who would be much more inclined to attend them than they are now. I have heard some, who drink moderately, express regret at the intemperate drinking indulged in at some of the meetings.

As a natural consequence of this encouragement to drink, it seems to me that we are having more judges, who are known to drink, and sometimes to excess, than was the case a few years ago.

If the tendency continues to increase, it will result in no credit to the profession.

I know of some younger lawyers who feel as I do about this who love their profession and deeply regret anything that has a tendency to lower it in actual worth or in public esteem.

J. M. HAW
Charleston, Missouri

Agrees with Mr. Coil

■ May I express my admiration for and concurrence in the article by Henry W. Coil in the May, 1952, JOURNAL entitled "Remarks on the Separation of Powers: A Reply to Professor Kinnane". I believe with Mr. Coil that there is grave danger to the liberty and rights of the citizens in permitting any substantial trespass by one branch of the government on the domain of either of the others. In matters so fundamental our motto should be *"Obsta principiis"*.

IRA JEWELL WILLIAMS
Philadelphia, Pennsylvania

Proposes New System of Citation

■ This is a day of change, and we are now experiencing attempts to change the systems of citing cases to each other and to the courts. A uniform system of citations has been worked out that is anything but uniform in the practical sense of the term. The closest that anyone ever came to a common sense approach to the subject was the Year Books, in the very early history of the English common law. The next closest approach to a really workable citation was used for a short while by the publishers of Lawyers Reports Annotated when in 1915 they began the designation of their Volume 53 of the new series as: L.R.A. (N.S.) 1915A and which terminated with L.R.A. (N.S.) 1918F. For about the same period of time and beginning a little before Volume 22 of American and English Annotated Cases was designated as Ann. Cas. 1912A and this was carried through to 1918D. Designation of the volume by the year however was short lived. The practical application of the idea has certainly been recognized by some publishers who still follow the system and more recently the University of Illinois which publishes the *Law Forum* started from its inception to designate the volume by the year and the number of the issue, there being four issues each year.

It will always be a mystery to me why the recent decision in the steel seizure case could not be designated as: *Youngstown Sheet & Tube Co.* v. *Sawyer*, 6-2 U. S. 1952. The case was decided (so we are told) on June 2, 1952, and it would be much more practical to have the cases decided in one year designated by the year in which they were rendered and the designation of that time could come last. Everyone is aware that 6-2 would stand for June 2. Often the report of the opinion is not given out until after time for filing a petition for rehearing or if one is filed, then not until after all the corrections are made that might be. In such cases the date of the ultimate or final decision should or would control the designation of how to find the case.

To illustrate the confusion let us turn to the very first citation of authority in the steel seizure case. We find that it is: *Hooe* v. *United States*, 218 U.S. 322, 31 S.Ct. 85, 54 L.Ed. 1055. That does not tell us a thing about when the case was decided. The case in fact was decided in 1910 and could just as easily have been designated as: U. S. 1910, or by the reporting system as: —S.Ct.1910 or by the Co-Ops. Co. as:—L. Ed. 1910.

There is no doubt but that some of the publishers would insist upon designation in their books by page number instead of month and day, but that would not lead to serious quarrel. Assuming that only one volume of Lawyers Edition was published in 1910 as they presently seem to be practicing then the case would have been designated as: 1055 L. Ed. 1910. Or assuming that Volume 218 was the second volume of the official reports then the case could have been designated by page and book as: 322 U. S. 1910B. Here we have the simple expedient of using a letter of the alphabet to distinguish between the first and second volume in that one year of 1910. In state reports that would be the case particularly in Illinois where about four Supreme Court and about six Appellate Court volumes come out each year, and because of the great number of pages involved the date designation for the citation seems to lend itself more readily to an expanding judicial system, which of course has to expand as long as the population increases, otherwise many people will be denied the right of appeal which is almost what has happened.

Page designations in citations also lose their significance in the changing trend of opinions. Judges do not quite get the bench warm until they become linguistic gymnasts. To pin them down a little closer to the application of the doctrine of *stare decisis* the day-to-day designation would more readily show the span of time in which it takes the opinion writer to contradict himself. With the microfilming of reports, texts, statutes and other law books a new and better system of citation is called for.

ZENO MIDDLETON
East St. Louis, Illinois

Says GATT Explanation Was Misleading

■ The article "Once in GATT, Always in GATT: The Complications of Complexity", by Edwin G. Martin, appearing in the May, 1952, issue, is a most illuminating commentary. Yet for all its excellence, I must take exception to the explanation of GATT given in the headnote as "an agreement between the United States and China granting tariff concessions to the Nationalist Government". The definition is erroneous and misleading.

The General Agreement on Tariffs and Trade is not a specific bilateral agreement between two countries. It is a general and multilateral agreement among many countries within the framework of which specific bilateral trade agreements can be and have been worked out by the members of that organization known as the "Contracting Parties of the General Agreement on Tariffs and Trade". The United States and China are two of the original twenty-three contracting parties.

The immediate origins of the General Agreement on Tariffs and Trade are the Atlantic Charter of 1941, Article VII of the wartime lend-lease agreements, and the "Proposals for the Expansion of World Trade and Employment", prepared in 1945 by our government officials as a draft of a charter for the contemplated International Trade Organization. The Atlantic Charter contains a statement of the signatory governments that it is their intention to "endeavor, with due respect for their existing obligations, to further the enjoyment by all states, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity". Later, when all the United Nations adopted the Atlantic Charter, this passage came to be known as the economics clause of the charter.

In Article VII of the wartime lend-lease agreements, the individual governments agreed that in the postwar settlement of lend-lease accounts with the United States, the terms

> . . . shall not be such as to burden commerce between the two countries, but to promote mutually advantageous relations between them and the betterment of world-wide economic relations. To that end, they shall include provision for agreed action . . . open to participation by all other countries of like mind, directed to the expansion, by appropriate international and domestic measures, of production, employment, and the exchange and consumption of goods, which are the material foundations of the liberty and welfare of all peoples; to the elimination of all forms of discriminatory treatment in international commerce, and to the reduction of tariffs and other trade barriers. . . .

Our Government's "Proposals for the Expansion of World Trade and Employment" were used as a basis for discussion, first with Britain, Canada and other nations, then at various formal international trade conferences called by the Economic and Social Council of the United Nations and held over a period of two years at London, Geneva and Havana. The final conference, held in Havana in 1947-48, culminated in the acceptance for submission to their respective governments by fifty-four national delegations of the proposed Charter for an International Trade Organization (ITO) to go into effect as soon as twenty of the signatory governments would formally ratify it.

While the Geneva Conference of 1947 was going on, twenty-three of the participating countries representing about 70 per cent of the trade of the world got together in an attempt to take immediate advantage of the generally cordial atmosphere and of those sound propositions contained in Chapter IV of the proposed ITO Charter which could be applied immediately. The result was the first effective application of a system of multilateral tariff reform. These twenty-three nations sat down at bargaining tables and slashed tariffs on a reciprocal basis. The actual work was done by dozens of negotiating teams of specialists in groups of related products, getting together only after careful and painstaking preparations. Pairs of negotiating teams met at each table, considering cases on a selective, product-by-product basis, and dealing only with commodities for which one country was the other's chief supplier. The concessions granted were then generalized to every other country under the most favored nation rule. The 123

completed negotiations, twenty-two of which were signed by the United States, were incorporated into the General Agreement on Tariffs and Trade (GATT), which was signed by the twenty-three participating nations on Oct. 30, 1947, in Geneva.

The original GATT consists of four parts. Volume One contains the general clauses of the agreement; Volume Two contains schedules I-VII; Volume Three contains schedules VIII-XI; Volume Four contains schedules XII-XX and the protocol of provisional application. The list of schedules includes each of the twenty-three contracting parties as follows:

Schedule I	Australia
Schedule II	Benelux (Belgium, Netherlands, Luxembourg)
Schedule III	Brazil
Schedule IV	Burma
Schedule V	Canada
Schedule VI	Ceylon
Schedule VII	Chile
Schedule VIII	China
Schedule IX	Cuba
Schedule X	Czechoslovakia
Schedule XI	French Union
Schedule XII	India
Schedule XIII	New Zealand
Schedule XIV	Norway
Schedule XV	Pakistan
Schedule XVI	Southern Rhodesia
Schedule XVII	Syro-Lebanese Customs Union
Schedule XVIII	Union of South Africa
Schedule XIX	United Kingdom
Schedule XX	United States of America

Article XXIX of GATT also provides the mechanism for transferring the entire operation into the International Trade Organization as soon as the proposed ITO Charter enters into force. Since it went into effect, there have been two sessions held, at Annecy, France, in 1949 and at Torquay, England, in 1950. At these, the contracting parties of GATT were joined by additional nations. The participating countries with which the United States has trade agreements now number thirty-three. The organization is, in effect, if not in name, a rather watered-down version of the proposed ITO.

From the foregoing it is clear that our trade treaty with Nationalist China discussed by Mr. Martin is but one of many into which we have entered under GATT. The treaty with China is *not*, by itself, synonymous with GATT.

JULES J. KOHENN

Chicago, Illinois

OUR YOUNGER LAWYERS

Robert A. Stuart, Secretary and Editor-in-Charge, Springfield, Illinois

■ No matter to what cause it is attributed, misleading movies and radio programs, a few unscrupulous practitioners or (as one prominent New York attorney recently claimed) a reaction to the moral decay in public life—the consensus of members of the Bar is that the novitiate lawyer today is confronted with the generally skeptical, and far from respectful, attitude of the layman towards his chosen profession. The young lawyer is peculiarly sensitive to this public opinion; he is relatively fresh from law school where he has been able, in a detached manner, to examine critically the structure of the law with a view towards its improvement. He approaches practice with a healthy combination of idealism and personal ambition, as well as respect for the generations of labor which have been devoted to the common law. And above all, he has, in addition to this faith in his profession, youth and vigor.

What better emissaries to the layman can the profession have in its present struggle with the public attitude which makes the lawyer, with alarming frequency, the butt of jests and a subject for abuse? A recent article in the JOURNAL urged the enlistment of public relations professionals in this cause. There can be no question that the expense of such an undertaking is both justified and necessary, but even if such assistance were to be procured, the professional public relations man could only act as a guide for, but not replace, the public relations function of each lawyer.

The Public Information Program of the Junior Bar Conference has long recognized the importance to the entire profession of the young lawyer as such an emissary. The program provides an organization through which the efforts of young lawyers throughout the nation may be stimulated and co-ordinated.

The means chosen by the program are primarily indirect, that is, the attempt is made to foster projects in communities throughout the country through which these new members of the Bar by being of some service to the community may help to replace cynicism with respect.

To illustrate, in a particular state the State Director of this program may promote the broadcasting of a series of radio programs in cities or towns in which free radio time may be secured. In other communities a speakers' bureau may be organized which offers to social organizations a panel of speakers composed of young lawyers who are each prepared to talk on one or more of a series of currently interesting topics. Wherever the local and state bar associations carry on such projects the program merely attempts to encourage and assist such activity. In any community where no such activity is being carried on, the State Director seeks to initiate projects which may

be carried forward entirely by junior bar personnel.

The programs, whether of the speakers' bureaus or on radio or television, are generally devoted to a discussion of the legal aspects of subjects of interest to the community, and in some cases, to dramatic shows, dealing with such topics. Some topics are current ones, such as "Should Trials Be Televised?" Others (such as "Public Power and the Private Utilities") are directed towards regional interests. Still others of the textbook type discuss the functioning of our government and the judicial system in particular. The approach is one of judicial impartiality and analysis. The object is to seek to enlighten rather than to crusade. Subjects which might in any way be regarded as "commercials" for the employment of lawyers are avoided. By performing such services in a locality without any remuneration, or "axe to grind", not only is good will created but the residents of the community are reminded of the lawyer's public function.

The only direct approach made by the program lies in its attempts to publicize to the community the existence of these projects sponsored by lawyers and to counteract misleading items concerning the profession in the press or on the radio.

The key personnel in the carrying out of this program are, of course, the directors of the program in each state.

With the foregoing realization, as stated by Donald J. Lunghino of New York City, its National Director, the Public Information Program Committee of the Junior Bar Conference during the current year has undertaken a program designed to accomplish the following purposes: (1) to inform the various state directors as to the type of program which should be conducted in their respective states, and to furnish to the local organization materials for its assistance, (2) to establish a chosen contact between the national directors and the state directors of the program, and (3) to procure detailed reports from the various local groups for the mutual benefit of, and dissemination to, all affiliated groups.

Toward the accomplishment of these purposes, a series of bulletins was planned for the purpose of instructing the state directors in the effective operation and conduct of the program. To this date three such bulletins have been prepared and distributed. The first of these bulletins, prepared by the Executive Director of the Program, Thomas G. Meaker, New Haven, Connecticut, dealt with "Organization and Analysis"; the second, covering the general subject of "Speakers Bureaus", was prepared by Associate Director Robert W. Walter, of New York City. The third bulletin devoted to "Newspaper Publicity" was drafted by Edward B. Winn, of Dallas, Texas, an Associate Director. Other bulletins dealing with "Liaison with Other Bar Groups" and "Radio and Television Programs" are contemplated.

Under the direction of John A. Cook, of Chicago, an inventory of materials available from the Headquarters Office in Chicago for use in the development of local programs is being prepared. It is intended that such an inventory will soon be available for distribution to local groups and state directors.

The Conference program is under the direction of the following: Donald J. Lunghino, National Director; Thomas A. Meaker, Executive Director, Rush H. Limbaugh, Jr., Cape Girardeau, Missouri; Robert W. Walter, New York City; Edward B. Winn, Dallas, Texas, Associate Directors. Other members serving on the Committee are: David Doane, Boise, Idaho; William E. Skye, Alexandria, Louisiana; Joseph Olk, Jackson, Michigan; Harold Draper, Flint, Michigan; and John P. Zebelian, Jr., Baltimore, Maryland.

Requests for further information should be addressed to Donald J. Lunghino, 15 Broad Street, New York 5, New York.

Criminal justice is concerned with the pathology of the body politic. In administering the criminal law judges wield the most awesome surgical instruments of society. A criminal trial, it has been well said, should have the atmosphere of the operating room. The presiding judge determines the atmosphere. He is not an umpire who enforces the rules of a game, or merely a moderator between contestants. If he is adequate to his functions, the moral authority which he radiates will impose the indispensable standards of dignity and austerity upon all those who participate in a criminal trial.

Mr. Justice Frankfurter,
dissenting in *Sacher* v. *United States*,
343 U. S. 1 at 37, 72 S. Ct. 451 at 469
(1952).

Activities of Sections and Committees

SECTION OF ADMINISTRATIVE LAW

■ Pending legislation in the field of administrative law is scheduled for discussion during the afternoon session of the meeting of the Section of Administrative Law on Tuesday, September 16, at the forthcoming Annual Meeting in San Francisco. Certain of the legislative measures on which the 82d Congress failed to act before adjournment are sure to receive interested attention during that session. A number of bills were introduced in the House and Senate, for instance, the purpose of which was to modify the effect of the holding of the Supreme Court of the United States in the case of *United States* v. *Wunderlich,* 342 U.S. 98. Extensive hearings were held on these bills but there was not sufficient uniformity of approach to inspire the necessary support for enactment of any one of the measures. However, S. 2487, Senator McCarran's bill, was passed in the Senate.

H. R. 5045, introduced by Congressman Walter, which was a bill to validate certain proceedings in the Interstate Commerce Commission, which were conducted by examiners not qualified as hearing examiners under the Administrative Procedure Act, also failed of enactment in the 82d Congress. The bill passed the House of Representatives but it was not reported out of committee for consideration by the Senate. H. R. 5045 was introduced as a result of the Supreme Court's *per curiam* opinion in the case of *Riss & Co., Inc.* v. *United States,* 341 U.S. 907, the effect of which was to subject hearings in the Interstate Commerce Commission to the provisions of the Administrative Procedure Act. It is felt by some that enactment of a measure like H. R. 5045 is imperative in order to make it unnecessary to rehear several thousand cases which were decided prior to the *Riss* decision and to remove a cloud from the operating rights of many transportation companies.

Space does not permit description here of a number of other pending items of legislation concerned with the adjective phases of administrative law, but the discussion in San Francisco promises to be interesting and informative.

SECTION OF CORPORATION, BANKING AND BUSINESS LAW

■ The program of this Section at the Annual Meeting in San Francisco has been announced. General sessions of the Section will be held in the Palace Hotel on the afternoons of September 15 and 16.

On September 15, following the address of welcome by Farnham P. Griffiths, of San Francisco, there will be a panel discussion on "What's New in Corporation Laws", at which will be discussed trends in modern corporation statutes relating to capital and surplus, voting rights, management, restated charters, donations, close corporations, what constitutes doing business, etc.

On September 16, the principal speaker will be Adolf A. Berle, Jr., former Assistant Secretary of State of the United States, Professor of Corporation Law at Columbia University. His subject will be "The Modern Corporation in the Modern State".

The Section reports almost a thousand new members during the past four months.

TRAFFIC COURT PROGRAM

■ During the fiscal period which ended June 30, 1952, the Traffic Court Program engaged in the following activities:

I. Eleven Judicial Conferences for traffic court judges and prosecutors.

II. The Traffic Court Program represented the American Bar Association at other conferences and meetings, a total of nineteen.

III. Field visit activity resulted in thirty-eight separate meetings, contacts or other promotional approaches.

IV. The Special Committee on Traffic Court Program held four meetings during the year.

V. Studies and surveys authorized by the House of Delegates at the 1952 Mid-Year Meeting: installed a City and Police Court in Hartford, Connecticut, and prepared a Traffic Court Violation Bureau in cooperation with the Traffic Institute of Northwestern University; made a study of the Arizona Courts of Limited Jurisdiction in connection with the Traffic Institute of Northwestern University and prepared a report which has been submitted to the State Highway Department.

VI. Traffic Court Contest: Seven hundred thirty-five cities participated in the Traffic Court Contest. Each questionnaire was graded. Valuable assistance was received from the National Safety Council in this behalf. More than 6,000 analyses of the status of the Traffic Court were prepared.

Many tangible accomplishments have been achieved this year. The special committee consisting of Albert B. Houghton, Chairman, Roy A. Bronson, Raymond N. Caverly, Donald A. Finkbeiner, and Robert W. Upton, has rendered valuable service to the program.

BAR ACTIVITIES

Paul B. DeWitt · Editor-in-Charge

▪ Encouraged by the co-operation and assistance of the Committee on Local Bar Association Activities of the Ohio State Bar Association, many of the local associations during the past year have sponsored a number of new activities and projects. The Dayton Bar Association has organized a Speakers' Bureau and a Reference Service. The Cincinnati Bar Association has joined with other associations in publishing studies on the proposed Constitutional Convention. The *Columbus Bar Briefs* is publishing the "New Rules of the State Administrative Agencies", and recently sponsored an extremely successful Institute for Legal Secretaries. This Institute, planned in co-operation with the College of Commerce of Ohio State University, included a presentation of a mock trial, visits to the Crime Detection Laboratory and a panel discussion on the perfect legal secretary. The Akron Bar Association has been very active in the field of public relations. The Public Relations Committee has carried out an extensive program including billboard advertising; monthly radio programs on subjects of current interest; public school work including a film "Why We Respect the Law", purchased by the Association and placed in the film library, shown to several thousand children, distribution of 45,000 pamphlets setting forth the Declaration of Independence and the American Bill of Rights, staging mock trials and many special talks to classes; forty-one mock trials were staged before a total audience of approximately 45,000; window displays; advertising and monitoring. The program for distributing to the schools copies of the Declaration of Independence and the Bill of Rights was developed by the President of the Association, H. B. Harris, after he had read about a spot-check survey of some papers, which indicated that the average citizen does not understand the language or meaning of the two documents. In co-operation with Allen T. Simmons, owner of Radio Station WADC in Akron, who is paying all expenses of the program, and with the permission of the School Board, Akron, Barberton and Cuyahoga Falls students from the fifth to the twelfth grades will receive copies of the two documents.

J. Glenn TURNER

Gittings

▪ J. Glenn Turner, of Dallas, was elected President of the State Bar of Texas to succeed Cecil E. Burney. Mr. Turner was President of the Dallas Bar Association in 1939 and is a former member of the American Bar Association's House of Delegates. Among the speakers at the annual meeting were President Howard L. Barkdull, of the American Bar Association, Judge Alfred P. Murrah, Erle Stanley Gardner and Paul Lashly.

▪ The Matrimonial Law Committee of the Chicago Bar Association, of which Francis J. Nosek is the Chairman, has prepared a proposed Uniform Divorce Act. Copies of the Act have been sent to the American Bar Association, the National Conference of Commissioners on Uniform State Laws, and the Interprofessional Commission on Marriage and Divorce Laws. The theory of the proposed Act is that legal machinery should be made available for the purpose of preserving the family and the Act sets forth the specific minimum requirements for a good family relationship and gives the court the right to terminate the marriage only upon a showing that a family fails to meet these minimum requirements.

Oscar T. TOEBAAS

▪ Oscar T. Toebaas, Madison, was elected President of the Wisconsin Bar Assocation at its annual meeting. Mr. Toebaas has appointed twenty standing and six special committees and an interesting program for the coming year is planned, which includes co-operation with the newly established Judicial Council in improving judicial administration through relief of crowded court calendars. Out-of-state speakers on the program of the annual meeting were Kurt F. Pantzer, of Indianapolis, and Arch M. Cantrall, of Clarksburg, West Virginia. E. Harold Hallows, of Milwaukee, was designated president-elect of the Association.

William BUTT

▪ William Butt, of Blue Ridge, Georgia, was elected President of the Georgia Bar Association at its annual meeting in June. He succeeds Judge F. M. Bird. Mr. Butt was the second President of the Blue Ridge Circuit Bar Association and was Chairman of a Committee which organized practically three-fourths of the Circuit Bar Associations in Georgia. He has been a member of the Board of Governors of the Georgia Bar Association since 1938, except for one year, which is a record for tenure on the Board.

Books for Lawyers

(Continued from page 755)

with the mere mechanics of the lawsuit. He discusses the judge, how he should be selected, and judicial ethics; the jury system and how jurors should be selected; and finally the organization of the Bar and the lawyer's fidelity to it. Just as Vanderbilt's *Minimum Standards of Judicial Administration* has set a pattern for those who are directly charged with the administration of justice in the courts, so does his casebook set the pattern for the study of the law according to those standards. In short, the book is designed to teach the law student in the ways of the administration of justice today, not yesterday.

ALFRED P. MURRAH
United States Court of Appeals
Oklahoma City, Oklahoma

LEGAL AID IN THE UNITED STATES. *By Emery A. Brownell. Rochester, New York: Lawyers Cooperative Publishing Company. 1951. $4.50. Pages xxiv, 333.*

This book is an important part of the Survey of the Legal Profession being made by the American Bar Association under the directorship of Reginald Heber Smith. It does what a survey should do—it tells the truth, the whole truth and nothing but the truth. This is a tribute to the integrity of the author of the book and the Director of the Survey. Mr. Brownell has devoted most of his life and staked his happiness on the development of legal aid. Mr. Smith is the author of the original legal aid classic, *Justice and the Poor,* published by the Carnegie Foundation in 1919. He is the dean of legal aiders but, so that no one may be misled as to the length of his beard, it may be stated that at that time he was less than thirty.

From the foregoing it may correctly be inferred that the facts about legal aid in this country today reveal more deficiency than distinction. The reviews of Mr. Brownell's book emphasize this and some of them probably exaggerate it. Most of the reviewers point out the deficiency with regret and a desire to encourage intensive work through the traditional form of private organizations financed by voluntary contributions from the community, except on the criminal side where the method has been, and should be, a matter of local option. One or two reviewers seem to revel in the situation and to make it an argument for the taking over of legal aid by the State.

I have been active in legal aid for over twenty years. I have always been confident, and am today more confident than ever, that the American style of legal aid will assure greater protection of the civil rights of those who cannot afford to pay a lawyer than any other system. As to protection in the criminal courts, there is still no clear and positive answer. A great deal of study and planning remains to be done if the existing shortcomings are to be remedied. But there are multiplying signs that the Bar is seriously concerned and a corresponding hope that adequate protection will eventually be afforded by such means as seem to be most desirable and practicable in the particular community.

There is no doubt that *Legal Aid in the United States* has stirred the conscience of lawyers and laymen alike to the need for better legal aid service in this country, particularly in the criminal courts. This is a repetition of what the publication of *Justice and the Poor* accomplished. It is hoped that the cumulative effect of these two studies will be such that any survey of the situation thirty years hence will show adequate legal aid throughout the country. But that will not come to pass through a mere process of hoping.

I repeat that Mr. Brownell has correctly pictured the situation and that the picture gives everyone—and I mean everyone—something to worry about. There would be even more to worry about if there were any spirit of defeatism on the part of the Bar. Fortunately the Bar, true to tradition, inclines in the opposite direction and indulges in excessive optimism. Too many lawyers think that the accomplishment of the legal aid objectives is an easy matter. But legal aid workers know better and that in many places there is still resistance to the establishment of organized legal aid. On the civil side of the law, the initial opposition comes more from lawyers than laymen. On the criminal side, the reverse is true. The Bar understands the necessity that every man accused of crime shall be represented in court. The other members of the community have difficulty in fully grasping this and are apt to think that there is something inconsistent in having the public prosecute through a district attorney and at the same time defend the accused. However, the community gradually is being educated.

Legal Aid in the United States gives the total *1948* figure of seventy-nine legal aid offices furnishing reasonably adequate legal aid in civil matters. Today there are 123. Ten of these forty-four recently organized offices are in large cities, meaning those of a population of over 100,000. Bar associations in seven other large cities are presently committed to the organization of legal aid offices. But in the same breath it must be admitted that there are still seventy-three large cities in which there is no adequate service. In other words, progress is being made but there is still a long way to go.

On the criminal side the deficiency is even greater and the progress slower. This is pointed out in the review of Mr. Brownell's book by Judge J. Edward Lumbard, Jr., in the Spring number of the *Cornell Law Quarterly*.

Since most legal aid organizations do not handle criminal cases, it results that in considerably more than two-thirds of the counties of the country there is no service which can possibly be called satisfactory. Mr. Brownell concludes, at page 143:

> First, this country cannot afford to go on permitting thousands of its poorer citizens each year to face criminal prosecution without the minimum of protection by competent counsel.
>
> Second, the long and wistful at-

tempt to meet so large a need by the volunteer is a complete and abject failure.

Clearly there is no basis for complacency in connection with any aspect of legal aid. It is encouraging, however, that in the last three years fourteen state bar associations have undertaken statewide campaigns directed toward the establishment of organized legal aid facilities. Other state bar associations have gone into action with the result that thirty-eight now have legal aid committees as compared with half that number when Mr. Brownell compiled his figures. Credit for this activity should be given to the American Bar Association's Committee on Legal Aid Work under the chairmanship of Orison Marden, and to the co-ordination of bar association activities instituted during the presidency of Harold Gallagher. More or less simultaneously the National Legal Aid Association was reorganized in 1949, so that in addition to its traditional work in supervising existing organizations throughout the country it has now embarked on a promotional campaign to establish legal aid wherever it is needed. The handicap here is the lack of funds. Over 1300 lawyers have become professional members of the National Association and pay dues of $10 a year. The number should be multiplied. But even if it were, the revenue from this source would be insufficient for the work to be done. Accordingly, the Association is seeking contributions from foundations and corporations and meeting with considerable success.

Generally speaking, lawyers have been rather complacent about the inadequacies of legal aid service. Partly that means that they have been too ungenerous. It is true that the financing of legal aid is an obligation of the whole community rather than of the Bar alone and that on the whole people have met this obligation when the necessary initiative has been taken by lawyers. This initiative has been taken to the extent that bar associations have adopted resolutions and their officers have made speeches emphasizing the public need and the professional obligation. The rub has come afterwards when the money must be raised. The reluctance of the community, through its Chest or otherwise, to finance the first year or two of a legal aid operation is excusable. The refusal of the Bar to step into the breach is less understandable. If the lawyers in each city where legal aid is needed would assume the expense of the first two years of operation, there is little doubt that thereafter the community would accept its fair share of the burden. The cost of such a two-year demonstration, if divided among the Bar of a given city, large or small, would cost each lawyer only $15 a year for each of the two years. Unless everyone who has thought and spoken on the subject is utterly wrong, this is a small premium to pay as insurance against the welfare state.

HARRISON TWEED

New York, New York

THE RATIONAL STRENGTH OF ENGLISH LAW. *By F. H. Lawson. London: Stevens & Sons, Ltd. $2.50. Pages vii, 147.*

To the busy lawyer and the burdened judge, who are weary of the heavy atmosphere of the courtroom, this little book brings a breath of refreshing air from higher altitudes. It elevates the vision of the reader from the technical and sordid interests of practice to the broader perspective of the aims and purpose of law.

The author is a Doctor of Civil Law of Gray's Inn, Barrister at Law and Professor of Comparative Law in the University of Oxford. He deals with the law in easy and engaging style.

The book contains four lectures delivered under the auspices of the Hamlyn Trust. That trust was established by the daughter of an English solicitor who inherited a taste for law. She loved her country and wished its citizens to have a better understanding of its jurisprudence, "to the intent that the common people of the United Kingdom may realize the privileges which in law and custom they enjoy".

It is highly important today that the people of the United States should also understand more thoroughly that the freedom and privileges which they enjoy came directly from, and are still dependent on, the fundamental principles of Anglo-American jurisprudence. We cannot change the essence of that jurisprudence or undermine "the judicial power" by which it was carried into our Constitution without endangering the rights and privileges which characterize our way of life.

In the first part of the first lecture the author defines his terms and explains what he proposes to do. He then says:

> I shall therefore devote myself primarily to the examination of various portions of our law with a view to discovering the policies which they are intended to fulfil and the extent to which the law serves those policies in a rational way.
>
> In the rest of this lecture I shall consider the sources of English law and the ways in which it is developed from day to day. The second lecture will deal with the law of contract, the virtues and defects of which, though not easily discerned, can I think be thrown into relief by a comparison with Scots law. In my third lecture I shall essay the very difficult task of describing what, somewhat eccentrically perhaps, I regard as one of the most brilliant creations of English law, our law of property. In my fourth lecture, after endeavouring to rationalise the law of torts, I shall sum up briefly some of the most important conclusions to which I have come.

The book attains its objective. The author concludes: "English law is therefore not only rational but strong."

While the book is valuable for its main thesis, that is not its only virtue. The journey which the reader makes with the author is pleasant and profitable not only because of its destination but also because of the views and observations along the way.

The author leads us into a way of thinking about the law which is sorely needed today. His incidental observations throw great light into dark and obscure places and some of

our heated discussions are dissolved in his more profound conclusions and broader perspectives.

He deplores "the enormous inroads that have been made elsewhere on the free and pure administration of justice, and the degradation of the law into a mere instrument of policy".

He says:

> This conflict between the rational and the arbitrary is very old and seems inseparable from law. It was noticed by Aristotle, who distinguished between the *natural* and the *conventional* elements in law, the former being eternal, the latter relative to time and place.
>
> No practical lawyer would now try to distinguish the natural from the conventional elements in any legal system. He would feel that all of it should aim at perfect justice and he would not expect any part of it to succeed. He would however tend to regard some parts of the law as having more or less settled down. He would say, if he thought at all consciously about them, that their rules and principles have been determined or should be determined by the exercise of reason and common sense, and above all, that all fresh determinations should be arrived at impartially. Even where acute controversies occur they should not be settled by the will of a party majority, whether organised or not, but by a simple consideration of right and wrong; and in so far as they should conform to anything, they should conform to the inner logic of the pre-existing law, not to any actual or supposed view of policy.

The distinction between common law and equity, he admits, is one of the most difficult in English law. Yet he says:

> The idea of such a distinction has always been present to the minds of lawyers, for they have always recognised that the best general rules may lead to injustice in a small minority of cases, which, if they are to be dealt with at all satisfactorily, must be decided according to rules of natural justice or morality overriding for the moment the doctrines of strict law.

In discussing mistake at common law and in equity, a broader use of equity is recommended:

> Thus at common law the effect of mistake, if held to be relevant, is to avoid the contract entirely. On the other hand, if it is not held to be relevant, the contract stands in its entirety, unless, that is, it can be rescinded for misrepresentation. These are often very crude solutions which fail to do justice between the parties.
>
> MISTAKE IN EQUITY
>
> What we really want is some method of dealing with problems of mistake which will treat all apparent agreements as valid contracts, will allow a mistaken party in a proper case to apply for rescission to a court, but will also allow the court to do substantial justice between the parties by putting a successful applicant on terms.

The author thinks this would be possible "by returning to the fountainhead of equity, that is to say, to the notion of conscience as the basis of all equitable jurisdiction".

On the problem of precedent the author's views are interesting:

> All I would like to say is that all the more advanced countries now report the decisions of courts, that the practices of all legal systems tend to converge and that in all countries the handling of judicial precedents is an art of which the rules vary a good deal but which constantly tends to escape those rules in practice. It must however be admitted that we still apply precedents more strictly than civil law or even American courts.
>
> Academic lawyers are apt to disapprove of the doctrine of precedent as strictly applied in England. Practicing lawyers do not take so hard a view of it. There is a very good reason for the difference of opinion. The academic lawyer is constantly thinking of the great general principles of law and often becomes impatient when some old decision seems to present an obstacle to their adjustment to new conditions. The practicing lawyer on the other hand is far more often concerned with questions of detail which might well be decided one way or the other without any obvious failure of justice. For him it is extremely important that he should be able to resort to precedent with a full knowledge of the relative force behind each past decision. He rarely comes into contact with cases where the older decisions seem to compel an unjust solution. Thus he is inclined to regard past mistakes as inevitable and the necessity for accepting them as a price which the law pays for certainty and predictability in the ordinary affairs of everyday life.
>
> Taking all these various factors into consideration I do not think that the doctrine of precedent is an irrational doctrine or one that binds us too closely to the past. For all its apparent rigidity it has not prevented the common law from keeping closely in touch with the changing needs of everyday life, and although French civil law seems to have proved rather more flexible than English civil law in the past century and a half we have Professor Gutteridge's word for it that of the two systems of commercial law English law has moved more readily with the times.

Other interesting quotations could be supplied if the JOURNAL had space for them. But the book contains them all.

ROBERT N. WILKIN
Charlottesville, Virginia

THE RISE OF MODERN COMMUNISM. *By Massimo Salvadori. New York: Henry Holt & Co. 1952. $2.00. Pages 108.*

This is a remarkable and, in my opinion, exceptionally important little book containing more intelligently balanced, varied, but connected, history in 108 small pages than one will generally find in many larger volumes. It is pocket size, written by an obviously qualified scholar who has worked and learned, not in an "ivory tower", but in the midst of war and political turmoil and on both sides of the Atlantic. He now lives in Northampton, Massachusetts, and teaches modern European history at Smith, Bennington and Mt. Holyoke Colleges, returning to Europe annually to keep in touch with current history.

Born in London of Anglo-Italian parentage, he was brought up in Italy; he was active, while still in school, in 1923, in the anti-Fascist movement, was wounded while trying to help his father (a philosophy professor) whose "liquidation" had been requested; escaped with his father to Switzerland, graduated at the University of Geneva, worked in the Italian "underground" in 1929, was arrested, jailed for a year and sentenced without trial to five years in a concentration camp. Released through nonofficial British intervention, he went to England, farmed and traveled in Kenya and Uganda in Africa, taught in the University of Geneva and in St. Lawrence University in Canton, New York. In

1941, he was entrusted by the British with missions to stop Nazi supply and information centers in Central America. In 1943 he entered the British army and, as a paratrooper in special operations, fought in the North African and Italian campaigns, operating behind the enemy lines, and, in 1945, as Lieutenant Colonel Salvadori, was decorated with the Distinguished Service Order.

All this shows that he knows more than most of us. What he writes should be read by every American who can get hold of the book. We are apt to be rather naïve, possibly even a bit conceited, when it comes to trying to learn something about understanding other countries or their history.

The report of the Special Committee on Communist Tactics, Strategy and Objectives of the American Bar Association was accompanied by a carefully prepared "Brief on Communism: Marxism—Leninism". I have heard that report and brief criticized as "one-sided", but anyone who reads this little book by Salvadori can make up his own *informed* opinion so far as the facts are concerned.

Beginning with the so-called "Utopian" phase of the socialist movement of the eighteenth and early nineteenth centuries, through the writings of St. Simon and others, and later Marx, he discusses the "liberal" movement which abolished slavery, developed parliamentary institutions, stressing the division of powers to eliminate arbitrary action and consolidate the rule of law; he refers to the suffering caused by economic changes and political conflicts and says "Europeans were considerably less poor around 1900 than they had been a century earlier, *but they were more conscious of their poverty and freer to express feelings of discontent. There was less injustice, but greater consciousness of what injustice remained.*" (Pages 2-3.) He traces the rise of Lenin "whose will became law in one of the largest nations in the world", and then shows the gradual spread of his first principle of "the seizure of power" by violence, the Marxian principle of the abolition of private property, etc. More than any other book I have seen, this book explains the conditions and reasons, the extent and the limitations, of this spreading, not only in Russia, but in practically every nation in the world. It is interesting that infiltration appears to have been least successful among people in the Moslem nations (see page 85):

> The efficiency of the communist parties derives to a large extent from the fact *that they are not political parties in the accepted meaning of the term.* They represent an all-embracing way of life which appeals to millions of individuals, not because of its economic or political implications, but because the party members have a certain "character structure." From this point of view, joining the party is an experience equivalent to that of joining a church in times of great religious fervor.

Readers of the recent books by Philbrick, Whittaker Chambers and others will do well to read this book for its comprehensive grasp of the contributing factors in the movement throughout the world for a long period of time and the balanced judgment of the author.

He concludes:

> Without disparaging the courageous democratic opponents of communism who, since the end of World War II, have conducted a brilliant and on the whole successful fight against totalitarianism, we may assume that what will happen in Continental western Europe during the near future will be the result more of external pressures (American and Russian) than of the autonomous working of internal forces. . . .
>
> Begun as one of the many extreme tendencies unknown to the general public at the turn of the century, communism stands today as possibly the most powerful single political movement, if not in the world, certainly in most of the Eastern Hemisphere.
>
> Communism today is less utopian than it was in its early revolutionary phase (1917-1923). It has a popular base which was lacking then; it enjoys the advantages of skilled and courageous leadership; it has become first and foremost a machine for the conquest of political power. There had been a beautiful dream, which is still the dream of many intellectuals who have little contact with reality. For those who believe in freedom, the reality of communism is a tragic one, and it is of no use deluding oneself that it will be transformed through an internal process of the communist movement.
>
> Looking at the institutions of the communist state and of the communist parties, at what is and not at what should or might be, one cannot escape the conclusion that communism negates the noble attempt made during the last three hundred years in Western civilization to make liberty the basis of the social order, to evolve institutions through which continuous peaceful change can take place, to replace arbitrary rule with rule by law, and government by force with government by discussion. The attempt has produced but limited results so far; success can be achieved only through an effort which includes an uncompromising opposition to communism.

He then illustrates the tragedy of the movement by the following footnote:

> "Communism, in its stage of so-called Utopia . . . taught love and kindness. . . . Upon becoming political . . . it turned to immorality, from love to hatred, the most intensified expression of which is Leninism." A. Gordin, *Communism Unmasked* (New York: Hord. 1940), page 308. "An idea which has inspired whole generations to matchless heroism has become identified with the methods of a regime, based on corruption, extortion and betrayal." Such is the revised opinion of the first secretary of the Comintern, A. Balabanova, *My Life as a Rebel* (New York: Harper. 1938). page 319.

A bibliography of books in English useful for students is added, including:

> A. Koestler, *Darkness at Noon* (New York: Macmillan, 1941). A novel, but a valuable book for the understanding of the communist mind and of the way it works. (This understanding is probably as important as the knowledge of the industrial strength of the Soviet Empire).

FRANK W. GRINNELL

Boston, Massachusetts

HEBREW CRIMINAL LAW AND PROCEDURE. *By Hyman E. Goldin. New York: Twayne Publishers, Inc. 1952. $4.75. Pages 308. Index.*

Dr. Goldin's training blends two great traditions—law and religion.

Like Paul's teacher nineteen centuries ago, Gamaliel the Elder, he is also a rabbi and a lawyer. The book was written with a dual purpose: To picture adequately ancient Hebrew social life; and to correct distortions in Hebrew law sometimes accepted by Christians. It does this—and more. It furnishes lawyers and librarians with an adequately indexed, thoroughly documented, and well-written summary of Hebrew law and procedure as it developed up to the third century. For those few lawyers who still wisely turn to the Old Testament for apt quotations bearing upon many of our basic rules of law today, it will be a handy *vade mecum* for quick-reference. It has a quality all too rare in reference books: It is interesting and readable, filled with footnotes of sometimes quaint, often astute, rabbinical opinions upon close legal questions. Although Hebrew law did not separate criminal and civil law (nor secular, from religious, law), the reader will be struck by one close parallel between modern law and Hebrew law; the Talmudic law grew through interpretations of the rabbis much as our common law grew through the case-law of the judges.

Hebrew law was derived from the *Torah*, the Books of Moses of our Old Testament, as a constitution or starting point. This was called the *written law (Torah she-biktab)* as distinguished from the body of rabbinical opinions developed after the Babylonian captivity, called the *oral law (Torah she-beal peh)*. This oral law was collected in the third century, arranged under six major "orders" or divisions, called the *Mishnah*. Most of the criminal and civil law was arranged under the order called *Nezikin* and within that order in the fourth and fifth treatises—*Sanhedrin* and *Makkot*. It is upon these legal materials (together with the Mosaic—first five—books of the Old Testament) that Dr. Goldin has so effectively drawn for his volume. These works classify crimes according to punishment, *Sanhedrin* covering those punished by death, imprisonment and the mob, while *Makkot* includes banishment and whipping. All these punishments (except, possibly, imprisonment) had biblical approval. Dr. Goldin thinks imprisonment was a later development by the rabbis, but, it seems to me, the requirement that homicides remain in the "cities of refuge" until the death of the High Priest (see Numbers 35:25) was a distinct, biblical approval of imprisonment as a form of punishment.

Nothing I know of is more conducive to a critical appraisal of modern law in action than a close study of the legal system of another people in some bygone age. Suggestive of the rewarding content of this volume in such a study are the following:

We cannot but be impressed with the high moral tone of Hebrew law, as compared with our own. Of roughly six hundred duties specified in Hebrew law, about two-fifths were ethical commands setting ideal standards required by God and about three-fifths were legal prohibitions enforced by the courts. Generally, crimes against the person invoked bodily punishments, while crimes against property resulted in punitive fines; thus, the law of property crimes tended more and more to become civil rather than criminal. A similar humane tendency (even capital punishment was administered in such a way as to reduce mutilation to a minimum) increasingly substituted fines for the primitive *lex talionis* in cases of personal injury. Lesser offenses, such as those for which the punishment was whipping, were tried by three judges, but all capital cases were tried by twenty-three judges. In these latter cases, a majority of at least two votes was required for conviction (a bare majority for acquittal), and one who had voted for conviction could change his vote to acquittal (an acquittal vote could not be reversed). An acquittal could be announced the day of the trial, but a conviction could not be adjudged until the day after trial. If there was a bare majority for conviction, two more judges were added from the "juniors" who had heard the case, and another vote taken, this being continued (if necessary) until the number reached seventy-one. Thus, the "hung jury" was no problem to the Hebrews. The "juniors", or students, were ranged, in the order of ability, in three rows before the judges; when a "junior" was appointed by the court, he was seated according to his learning and erudition. A vacancy on the bench was filled by promoting the ablest junior, then all the other juniors moved forward one seat. Those of us who favor the American Bar Association plan (sometimes called the Missouri, but more accurately called the Kales, plan) think of this selection of judges from a qualified panel as an enlightened, modern innovation. What a surprise to find that the Jews before Christ had developed a similar, but much more thorough, method of selecting the ablest judges for office! That "every man is presumed to know the law" we recognize as a fiction, false in fact, demanded by expediency. Such a presumption would have been no fiction among the Hebrews; according to the *Gemara* (oral tradition following the *Mishnah)* every Jew was required to write a Scroll of the Law for himself, a ruler two Scrolls—one for the royal treasury, the other to be kept always with him. If we had been wise enough to preserve such a tradition in American law, perhaps the states and private parties would not have been forced to have the courts point out to the Federal Government the line at which usurpation of power must stop.

Dr. Goldin is a capable and learned guide into an interesting and little-known bypath of the law. He does not assume the burden of the historian critically examining the origin and sources of Hebrew law; he contents himself with clear and accurate reporting from the vast body of ancient Talmudic law, which he accepts as he finds it. Many lawyers will read this book with mounting enthusiasm. Those who do not read it by-pass a gateway to an exciting, intellectual experience.

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The Need for a Treaty Amendment

(Continued from page 738)

mendation of the American Bar Association's Committee on Peace and Law Through United Nations, which had the subject under study for several years.[25] This recommendation was opposed by the Council of the Association's Section of International and Comparative Law, whose view that such an amendment was unnecessary, was overwhelmingly voted down by the House of Delegates, which is the official and final voice of the American Bar Association.

The published studies made by the Committee on Peace and Law over the past several years, and a series of recent articles[26] on the treaty-power, have raised intense interest in many quarters in a constitutional amendment. The editor of a leading newspaper received the 1951 Pulitzer prize for a series of editorials on "Government by Treaty";[27] he concluded with a plea for an amendment to the Constitution to prevent the setting aside of domestic law through the exercise of the treaty-making power. Three state legislatures in 1951 and 1952 recommended to Congress adoption of such a constitutional amendment.[28] In 1951 members of Congress introduced at least four proposals to amend the Constitution in this respect.[29] In a book published in 1952 a distinguished United States Circuit Judge has urged a constitutional amendment with respect to the treaty-power.[30]

On February 7, 1952, just prior to announcement and approval of the American Bar Association text on February 26, Senator John W. Bricker of Ohio, with cosponsorship of fifty-six Senators from both political parties (a group since enlarged), introduced S. J. Res. 130, proposing a constitutional amendment regulating both the treaty-power and the power of the President to make executive agreements. At the time of its introduction the Ohio Senator gave primary credit to the American Bar Association for its work in this field.[31] S. J. Res. 130 was proposed by Senator Bricker as a draft for study and consideration in order to bring these important constitutional issues to a head. The identical amendment was introduced in the House of Representatives on February 11, 1952, by Congressman Smith of Wisconsin as H. J. Res. 376.

At a hearing on what is now popularly known as the Bricker Amendment, before a subcommittee[32] of the Judiciary Committee of the United States Senate, held in May and June, 1952, the issue of making an amendment to the Constitution covering the power to make treaties and executive agreements was fully discussed, and opposing views were developed at length.[33]

As a result of these hearings and other studies,[34] and of published articles[35] which have recently appeared, the pros and cons of these questions of paramount public importance have emerged quite clearly.

Report of Committee Lists Purposes of Amendment

The Committee on Peace and Law of the American Bar Association, in its report[36] recommending to the House of Delegates the adoption of the constitutional amendment regulating the treaty-power (as noted above, the House of Delegates adopted the recommendation) stated that, without affecting the present method of presidential negotiation and Senate ratification of treaties, the following purposes are intended to be achieved by the proposal:

1. It is intended to remove any possible doubt that a treaty must be consistent with the Constitution and not in conflict with it.

2. The proposed amendment will prevent a treaty from becoming internal law in the United States by force of its self-executing terms. It will make all treaties non-self-executing so far as domestic law is concerned until Congress acts, thus bringing the position of the United States into harmony with that of the great majority of nations.

3. The text of the proposed amendment makes it clear that in legislating in respect to treaties, Congress shall have no power which it does not have under the Constitution, apart from its power to carry treaties into effect under the "necessary and proper clause" of the Constitution.[37] In other words, under the proposed amendment, Congress, in implementing a treaty, will have to legislate in accordance with its existing delegated powers, without en-

25. See Reports of Committee on Peace and Law, dated February 1, 1952 (Third Printing, May 1, 1952); September 1, 1951 (Second Printing, October 1, 1951); September 1, 1950; September 1, 1948.

26. Holman, "Treaty Law Making; A Blank Check for Writing a New Constitution", 36 *A.B.A.J.* 707 (1950); Ober, "The Treaty-Making and Amending Powers: Do They Protect Our Fundamental Rights?", 36 *A.B.A.J.* 715 (1950); Deutsch, "The Treaty-Making Clause: A Decision for the American People", 37 *A.B.A.J.* 659 (1951); Fleming, "Danger to America: The Draft Covenant on Human Rights", 37 *A.B.A.J.* 739, 816 (1951).

27. William Fitzpatrick, In *New Orleans States*, December 11-18, 1950. The Pulitzer prize award was made in May, 1951; see *New York Times*, May 8, 1951.

28. State legislatures were those of Colorado, 97 *Cong. Rec.* 353; California, 97 *Cong. Rec.* 6186; Georgia, 98 *Cong. Rec.* 1076.

29. See Report of Committee on Peace and Law, September 1, 1951 (October 1, 1951 printing) pages 61-62.

30. See Footnote 10.

31. For text of S. J. Res. 130, see *Cong. Rec.* February 7, 1952, page 921. See statements of Senator Bricker and various Senators, *Cong. Rec.* February 7, 1952, pages 920-928. Among other things Senator Bricker said: "Before explaining the joint resolution section by section, I should like to pay tribute to the magnificent work of the American Bar Association and its committee on peace and law through United Nations in alerting the American people to the dangers inherent in the treaty-making power. I desire to pay a special tribute to the association's distinguished past president, Mr. Frank E. Holman, of Seattle, Wash., for his pioneer work in this field. I hope that the American Bar Association's careful study of this subject over the past 4 years will result shortly in a proposal to amend the Constitution designed to accomplish the same objective as the resolution just introduced."

32. Senators Patrick A. McCarran, Nevada; Herbert R. O'Conor, Maryland; Willis Smith, North Carolina; Homer Ferguson, Michigan; Robert C. Hendrickson, New Jersey.

33. The proceedings at these hearings are understood to be in process of being printed. No committee report is expected until the next session of Congress.

34. Report of The Association of the Bar of the City of New York on S. J. Res. 130, May, 1952.

35. Arthur E. Sutherland, Jr., "Restricting the Treaty Power", 65 *Harv. L. Rev.* 1305 (June, 1952); George A. Finch, "The Treaty Clause Amendment: The Case for the Association", 38 *A.B.A.J.* 467, June, 1952; Zechariah Chafee, Jr., "Stop Being Terrified of Treaties: Stop Being Scared of the Constitution", beginning at page 731 of this issue.

36. Report of Committee on Peace and Law, February 1, 1952 (Third Printing, May 1, 1952).

37. Article 1, Section 10, Clause 18; *See Missouri v. Holland*, 252 U. S. 416, 432.

largement of those powers from the treaty itself.

The proposal will make it certain that the limitations on "Congress", as such, in the First Amendment that "Congress shall make no law" cannot be escaped by use of the treaty-making power under the claim that the President and Senate are a separate agency for treaty-making and are not subject to constitutional limitations on "Congress".[38]

The case for the amendment proposed by the American Bar Association has heretofore been strongly developed[39], but scattered objections continue to persist.

Sincere critics of any limitation on the present treaty-power make a number of earnest claims.

It is asserted that the first sentence of the proposed amendment is "unobjectionable in itself, but unnecessary".[40] As pointed out above, there is at the present time surrounding this subject a very large doubt, the removal of which all persons can and should approve.

Amendment Would Contribute Much to Clarity

It is asserted that the most far reaching part of the proposal provides that " a treaty shall become effective as internal law in the United States only through legislation by Congress". It is said that wiping out our existing constitutional principle by which most American treaties are self-executing, would be bad.[41] The fact is that making all treaties non-self-executing in the domestic area until Congress acts, will contribute much to clarity, will let the several states of the United States know promptly where they stand (which is not now possible until after years of litigation), will put us on a parity with other nations insofar as the internal effect of a treaty is concerned, and will put the world on notice of the limitations on our treaty-making power.[42]

In the leading countries of the world, treaties are not enforceable in the courts as domestic law in the absence of implementing legislation. No good reason is shown why the United States should be in a disadvantageous position in that regard.

It is believed that the State Department, as well as the Senate, will be greatly aided in the avoidance of inadvertences or doubtful provisions and in obviating the necessity of trying to solve in advance difficult questions of the self-executing character of treaty clauses, or the difficulty of obtaining satisfactory federal-state clauses in treaties, if the proposed provision is adopted making all treaties non-self-executing until Congress acts by separate implementing legislation.

The argument that our situation is different because ours is a federal state is untenable. The Judicial Committee of the Privy Council in 1937 disposed of this contention in *Canada* v. *Ontario*[43] by holding that when a treaty deals with provincial classes of subjects, they must be dealt with by the totality of powers, dominion and provincial legislatures together; in other words, by co-operation between the dominion and the several provinces. While two or three Canadian lawyers have expressed regret over the effort necessary to procure such co-operation, this is not a sound argument in support of having the central government override state laws in areas reserved to the Canadian provinces, or in the United States reserved to the several states.

It is also earnestly claimed by critics of the American Bar Association's proposal that the Senate of the United States is a sufficient guardian of American rights without any constitutional amendment. This, for instance, is the position of The Association of the Bar of the City of New York,[44] which, in deeming an amendment unnecessary, stands alone among the numerous bar associations that so far have considered the matter. These New York lawyers approve the principle that a treaty should not amend or abridge the Constitution of the United States, but they are unwilling to incorporate this safeguard into a constitutional amendment. They approve the idea that a treaty should not generally make domestic law for the people of the United States; and if a treaty does so, that then Congress may pass an act nullifying or superseding such a treaty; but they are unwilling to give the American people the safeguard, in the first instance, of having a provision in the Constitution that will protect American rights against such treaties, and make it unnecesary to engage in the dangerous practice of repudiating them. In other words, the Report of The Association of the Bar of the City of New York advocates that the American people make the oft repeated mistake of waiting until the horse is stolen before taking any steps "to lock the barn". One might as well say that we must first let an evil happen before we correct it, or

38. See Report of Committee on Peace and Law, September 1, 1950, pages 40-41. While there have been cases which assume that the First Amendment applies, for example, to judicial contempt proceedings (*Toledo Newspaper Co. v. U.S.*, 247 U.S. 402, 419-20) and to the executive department (*Joint Anti-Fascist Refugee Committee v. Clark*, 177 F. 2d 79, 87), still, the broad claims made for the treaty-power leave the question in doubt. In *Zorach v. Clauson*, decided April 28, 1952, 72 S. Ct. 679, Mr. Justice Douglas, speaking for the majority of the Court, said: ". . . It [The First Amendment] studiously defines the manner, the specific ways. . . ." Moreover, *Missouri v. Holland* shows that, contrary to Jefferson's opinion (see main text following footnote 8), the President and Senate, acting as the treaty-making agency, can do things that Congress cannot do.

39. See Finch, *supra*, footnote 23; Report of the Committee on Peace and Law, February 1, 1952 (May 1, 1952 printing).

40. Zechariah Chafee, Jr., *Harvard Law School Record*, February 21, 1952.

41. *Ibid.* Whether or not and to what extent a treaty is self-executing is today a matter of judicial guess. See Chief Justice Marshall's decisions in *Foster v. Neilson*, 2 Pet. 253, *U.S. v. Percheman*, 7 Pet. 51, relating to the same treaty. Today leading experts disagree whether Articles 55 and 56 of the United Nations Charter are or are not self-executing. See 37 A.B.A.J. 741 (1951). See also the conflicting views in the several *Fujii* decisions (footnote 19) and the recent Idaho decision (footnote 18).

42. *Hackworth's Digest* 37; 5 *id.* 154, *et seq.* The proposal will avoid the presently anomalous situation where treaties may be binding as domestic law in the United States and enforceable in our courts, although not in the courts of the other contracting nation until it enacts the necessary and enabling legislation. This defect in our treaty law has been pointed out by Judge Manley O. Hudson in 28 *American Journal of International Law*, 276.

43. Law Reports, Appeal Cases, (1937), pages 326, 348, 353-4.

44. See footnote 34. It will be noted, too, that the Report of The Association of the Bar was written prior to Chief Justice Vinson's dissent in the Steel Seizure Cases.

that we should first have war before we prepare for it. The founding fathers who insisted on the Bill of Rights as a condition of ratifying the Constitution were preventing not those things that had happened, but those that might happen under the new Constitution. Who is so bold as to say that their foresight was an unwise restraint on government?

The fact that some sixty Senators themselves proposed consideration of a constitutional amendment affecting the Senate's powers in the treaty field, goes far toward meeting the argument that the Senate is a completely satisfactory control.

By way of example, on January 29, 1952, the Senate advised and consented to the protocol for the admission of Greece and Turkey to the North Atlantic Treaty with only six Senators on the floor. True, the protocol was later recalled and discussed at length on February 6 and favorable action again taken on February 7 with a quorum present, but the episode considerably weakens the contention made.[45]

Attention has been called above to the Warsaw Convention[46] with its hopelessly inadequate "fine-print" limitation of liability in the case of aircraft disasters, which manifestly escaped the attention of members of the Senate.

Under international law it is not necessary that treaties, to be enforceable as international agreements, be effective as internal law. International law is not concerned with the domestic effect of treaties. Mr. Justice Curtis said a century ago:

> If the people of the United States were to repeal so much of their Constitution as makes treaties their municipal law, no foreign sovereign with whom a treaty exists could justly complain, for it is not a matter with which he has any concern.[47]

It is asserted that the proposed amendment would limit the Congress in implementing treaties to its delegated powers in the absence of such treaties, and that this would unreasonably limit the Federal Government in the international field. It has already been ably pointed out that by virtue of its power to regulate foreign commerce, to define and punish offenses against the law of nations, to declare war, etc., the Congress now has delegated power to legislate with respect to all the important subjects in the treaty field.[48]

Amendment Would Not Unduly Limit Treaty Power

It will be noted particularly that the American Bar Association proposal does not prevent the President and Senate from making a treaty on any subject whatsoever; but it prevents the treaty from becoming effective as internal law in the United States except to the extent that Congress legislates within its delegated powers in the absence of such treaty. It may be that limiting Congress to implementing treaties within the field of its delegated powers, will exclude some areas in which treaties now automatically become internal law under the "supreme law clause"; but this will merely require, as pointed out by the Privy Council in *Canada* v. *Ontario, supra,* that in the case of the United States, in order to become internal law, they must be dealt with by co-operation between Congress and the state legislatures.

The proposed amendment is not intended to prevent the proper exercise of the treaty-making power; and it has been heretofore demonstrated that Congress already has delegated power to enact legislation to make effective as internal law in the United States treaties on the important subjects of external relations with respect to which the Federal Government is vested with power to act. If the proposed amendment is adopted, the Congress, and not the treaty-making power, will determine whether the terms of the proposed treaty should be binding on the states without their consent in areas in which Congress had delegated power in the absence of any treaty. In other words, it will be impossible to enlarge the congressional power through mere ratification of the treaty, or to reduce state power by the mere ratification of the treaty. The balance between state and federal power would then be subject to change only by the regular process of constitutional amendment, or such changes as may come about by judicial interpretation of the line between federal and state powers.

If the proposed amendment should pass, acts of Congress initially unconstitutional would not be rendered constitutional when re-enacted pursuant to a subsequent treaty; in other words, *Missouri* v. *Holland* would not be repeated. And a land law originally constitutional under both the federal and state supreme charters would not be rendered unconstitutional by the United Nations Charter; in other words, *Fujii* v. *California* in the lower appellate court, and the recent Idaho case, would not be duplicated.

As the Constitution is now construed, whatever may be the impact of treaties on the federal Bill of Rights, it cannot be contended that treaties will not override our state bills of rights, by which we also set great store. Americans, it is submitted, will never be satisfied with the suggestion sometimes made of

45. The *Washington Star* for June 14, 1952, reported that two consular conventions and a treaty protocol were approved with two Senators present. Says the *Star*: "Senator Sparkman, Democrat of Alabama, presided over a two-member Senate last night, called up two consular conventions and a treaty protocol, cast the only vote for them, and ruled that they had been approved by a two-thirds vote. The only other member in the Senate Chamber was Senator Thye, Republican, of Minnesota, who watched the proceedings with a grin but did not vote. He told the reporters later, 'I did not object' ".

46. See footnote 17.

47. *Taylor* v. *Morton* (1855), 2 Curtis 454; affirmed by Supreme Court, 2 Black 481; see also Finch, *supra*, footnote 23, at pages 468-469.

48. Finch, footnote 23.

the remoteness of the possibility of ratification of a treaty abridging liberties safeguarded under these bills of rights.

Supporters of the Association's amendment have been challenged to point to any ratified treaty raising questions that show the need for a constitutional limitation on the treaty-making power. The only treaty which has actually been ratified is the United Nations Charter itself, which has undoubtedly, under *Missouri* v. *Holland,* already conferred on Congress the unlimited power to implement by legislation treaties on all matters, including individual rights, covered by that instrument.

One group which objects strenuously to a constitutional amendment to limit the treaty-making power has strongly advocated for opening and signature, and ratification by the United States, of the Convention on Gathering and International Transmission of News and Right of Correction, which it will be recalled, recognized peacetime censorship and many other restrictions in conflict with American concepts.[49]

While the proposed Covenant on Human Rights has not yet been completed by the United Nations, representatives of the United States are zealously at work to bring about its early completion and adoption. All drafts of that covenant so far presented contain so-called guarantees of freedom of speech and press and of peaceable assembly and association subject to such restrictions as are "prescribed by law" or necessary to protect "public safety, order, health, and morals", and subject to a declaration of emergency officially proclaimed by the authorities, in which case a state may take measures derogating from its obligations with respect to those freedoms. Some of these same objectors to limitation of the treaty-making power, so far as internal law is concerned, who insist that no treaties endangering the constitutional rights of Americans have ever been ratified, are themselves striving to effect ratification of the foregoing treaties containing dangerous provisions. It is these recent activities which brought into being the American Bar Association's proposed constitutional amendment.

Amendment Gives States Needed Protection

The text of the proposed amendment was drawn to bring into sharp focus the whole problem of continuing the balance between state and federal power, in the light of the existing treaty power as now construed. The proposal as drawn gives the states protections they do not now have. It brings about certainty as to internal effectiveness of treaties within the states that does not now exist.

Let those American proponents of new treaties in the social, economic, cultural, and political and civil fields, who feel that the United States must take leadership in these crusades, first assist in obtaining a constitutional amendment at home to assure American citizens that there will never be an impairment of their fundamental rights in the process. "For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time."[50]

49. Report of Committee on Peace and Law, February 1, 1952 (Third Printing, May 1, 1952), pages 22 to 25.

50. Mr. Justice Sutherland, dissenting in *Associated Press* v. *NLRB*, 301 U.S. 103, 141 (1937).

The Patent Grant and Free Enterprise

(Continued from page 742)

selves or with others to fix prices, allocate customers or to use patent rights in hardboard to secure protection from competition beyond the lawful limits of such rights.

In the *Gypsum* case[25] (decided by the Supreme Court in 1948 and which was again before the Court in 1950 on the relief provisions of the District Court's decree) the complaint charged that the defendants had violated both Sections 1 and 2 of the Sherman Act by conspiring to fix prices on patented gypsum board and unpatented gypsum products, to standardize gypsum board and its method of production for the purpose of eliminating competition, and to regulate the distribution of gypsum board by eliminating jobbers and fixing resale prices of manufacturing distributors. The means employed by defendants to produce these results were price-fixing patent license agreements. The complaint also charged that the article claims of certain patents owned by the licensor, United States Gypsum Company, were invalid.

The Supreme Court, by a unanimous decision, ruled in favor of the Government in a decision that was significant for two principal reasons: first, the Court held that in a civil suit to restrain alleged violations of the Sherman Act, in which the defendants rely upon patent license agreements as the basis for price fixing, the Government is entitled to prove that the patents are invalid; and second, the Court again emphasized the rule that the patent law gives the patentee no general right to combine with others to fix prices or otherwise to eliminate competition, and that any combination of this nature violates the Sherman Act.

The *Tungsten Carbide* case[26] provides an excellent illustration of the shortages and exorbitant prices that result from restrictive patent agreements enforced by cartel groups. Because of a patent agreement between General Electric Company and the Krupp Works of Germany, the price of tungsten carbide in the United States became more expensive than gold. It rose from approximately $50 per pound to $453 per pound,[27] while the price in Europe remained in the $45 to $50 per pound bracket. In April, 1942, after an indictment under the antitrust laws, the price in the United States dropped to a range of from $27 to $45 per pound.

Judge Knox, in finding the defendants guilty of violating the Sherman Act, said:

> The total absence of price competition coupled with defendants' price fixing practices, are the sure signs of monopoly control. Competitors were excluded by purchase and by boycott, prices on unpatented products were fixed, resale prices were fixed, future patent rights were forced into the pool, world markets were divided, and on occasion prices were fixed beyond the scope of any asserted patent protection. Furthermore, many other restrictive practices were employed such as a Supervision Bureau and numerous threats of infringement suits.

Another example of antitrust enforcement in the field of patents is found in the General Electric lamp monopoly litigation. In 1911, the Government secured a consent decree against General Electric following the filing of a complaint charging restraint of trade and monopoly in the manufacture of incandescent lamps.[28] Thereafter, General Electric secured three patents which covered completely the modern tungsten filament lamp.

In 1926 the Supreme Court held[29] that, on the basis of those patents, General Electric could legally grant a license with a provision by which General Electric could fix the price at which the licensee sold lamps made under these patents. As noted earlier, this so-called "G.E. doctrine" was limited to a very narrow scope by the Supreme Court in the *Line Material* case.[30]

In 1941 the Government brought another suit against General Electric charging monopolization of the incandescent lamp industry. After a lengthy trial, the District Court decided that General Electric monopolized not only that industry but also the patents of the industry.[31]

The relief proceedings in this case have been extensive, and the issues have just been submitted to the Court. The Government has asked divestiture of plants and properties and General Electric's stockholdings in foreign competing lamp companies. In addition, it is seeking compulsory licensing and other appropriate relief as to General Electric's existing patents, future patents and know-how. Before the case was concluded, General Electric terminated most of the patent license arrange-

26. *United States* v. *General Electric Co.*, 80 F. Supp. 989 (D.C. N.Y. 1948).

27. *Id.* at 994, 996.

28. *United States* v. *General Electric Co.*, Equity No. 8120, N.D. Ohio, October 11, 1911.

29. *United States* v. *General Electric Co.*, 272 U.S. 476.

30. *United States* v. *Line Material Co.*, 330 U.S. 287 (1948). There, the owners of two patents, one of the patents being dominant over the other, combined the patents. Price-fixing licenses were issued under both patents, with one of the patentees serving as licensor. The Court held that the arrangement was unlawful.

31. *United States* v. *General Electric Co.*, 82 F. Supp. 753 (D.C. N.J. 1949).

ments which the Government attacked, dropped the use of its trademark "Mazda," and discontinued almost 100,000 agency appointments which the Government asserted were a device for price fixing. Thus a good measure of relief has been obtained even before the entry of judgment.

Illegal Restraints Are Duplicated in Other Cases

The types of illegal restraints discussed here have been duplicated in many other cases. From December, 1939, when the *Hartford-Empire* case was instituted, through May 31 of this year, the Antitrust Division has brought 665 cases under the Sherman Act, of which 142 involved the legality of patent practices. In these 142 cases, 23 have been decided on their merits by federal courts and 10 of that 23 have gone to the Supreme Court. The Government has prevailed in 20 of the 23 cases, all ten of those before the Supreme Court being decided in the Government's favor. Largely as a result of the Government's victories in the litigated cases, virtually all the remaining cases have been settled by consent judgments, which have, in the main, applied the principles stated by the Supreme Court. There are now thirty-nine patent cases pending in the courts. No doubt there will be many more in the days ahead.

Some of the more important principles enunciated by the courts in cases involving the use of patents to violate the antitrust laws may be briefly summarized. These principles are as follows:

(1) The public interest is paramount in the patent system and the reward of the patentee is an important but secondary consideration.[32]

(2) The owner of a patent cannot extend his statutory grant by contract or agreement, and a patent affords no immunity to a monopoly not fairly or plainly within the grant.[33]

(3) The patentee may not, as a condition of selling a patented item, establish price maintenance over subsequent resale.[34]

(4) The owner of a patent may not employ it to secure a limited monopoly on unpatented materials used in applying an invention.[35]

(5) The patentee, in the sale or lease of his patented article, may not exact an agreement from the buyer or lessee not to deal in the goods of his competitor.[36]

(6) The owners of separate patents may not, by cross-licensing, fix the price to be charged by themselves and their licensees.[37]

(7) Patentees may not agree to allocate market territories, either domestic or foreign, even if such an understanding is part of an agreement to cross-license their patents.[38]

(8) Patentees of competitive articles may not agree to accept the dominance of one patent and to suppress the exploitation of another as a part of a scheme to eliminate competition.[39]

(9) Competing patentees may not agree to divide fields of manufacture and sale to eliminate competition between their patented articles.[40]

(10) A patentee may not, as a condition of licensing his patented article, fix the price of unpatented articles.[41]

(11) Patentees may not pool their patents as a part of a general scheme or plan to monopolize or unlawfully suppress any segment of commerce.[42]

(12) A patentee or patentees may not impose quality and volume controls, the effects of which are unreasonably to discourage improvement of products and to maintain prices at an unwarrantedly high level by restricting production.[43]

Purpose of Antitrust Judgment Is Not To Punish Defendants

It may be of value here to outline briefly the general principles which have been established by the courts concerning the nature of relief in patent cases. The purpose of an antitrust judgment in a civil case is not to punish the defendants who have been charged with violations of the antitrust laws, but to apply the remedies which are necessary in the public interest to create the competition which would have prevailed if these improper acts had not taken place.

Normally, it is not sufficient simply to enjoin the improper acts of defendants which have taken place in the past. This is true for two reasons: (1) Experience has demonstrated that a company which has violated the antitrust laws in one way may attempt to do so again in other ways; and (2) other measures may be necessary to restore the competitive situation to that which existed prior to the improper practices. Mr. Justice Jackson stated this view very clearly in the *International Salt* case.[44]

Many antitrust judgments in patent cases contain provisions requiring the defendants to grant licenses under their patents at reasonable royalties; in a few cases, judgments have required the defendants to license their patents upon a royalty-free basis, with the purpose of eliminating the illegal practices and affirmatively rebuilding the competition which has been destroyed.[45]

If defendants have used patents to restrain trade in an industry and to deprive the industry of freedom

32. *Pennock v. Dialogue*, 2 Pet. 1, 19 (27 U.S. 1829); *Mercoid Corporation v. Mid-Continent Investment Company*, 320 U.S. 661, 665.

33. *United States v. Masonite Corporation*, 316 U.S. 265 (1942).

34. *United States v. Univis Lens, Inc.*, 316 U.S. 241 (1942).

35. *International Salt Company v. United States*, 332 U.S. 392 (1947).

36. *United Shoe Machinery Corporation v. United States*, 258 U.S. 451 (1922).

37. *United States v. Line Material Company*, 330 U.S. 287; *United States v. New Wrinkle Co.*, 342 U.S. 371.

38. *United States v. National Lead Company*, 332 U.S. 319 (1947).

39. *United States v. Masonite Corporation*, supra note 33.

40. *Hartford-Empire Company v. United States*, 323 U.S. 386 (1945); 324 U.S. 570 (1945).

41. *United States v. United States Gypsum Company*, 333 U.S. 364 ((1948).

42. *Standard Oil Company of Indiana v. United States*, 283 U.S. 163 (1931); *United States v. General Instrument Corp.*, 87 F. Supp. 157 (D.C. N.J. 1949).

43. *United States v. General Electric Co.*, 82 F. Supp. 753 (D.C. N.J. 1949).

44. *International Salt Co. v. United States*, 332 U.S. 392, 400 (1947).

45. The first litigated judgment to contain provisions for royalty-free licensing was in *United States v. American Can Co.*, 87 F. Supp. 18 (N.D. Cal. 1949). See also *Hartford-Empire Co. v. United States*, 323 U.S. 386, 413, 414; *United States v. National Lead Co.*, 332 U.S. 319, 349; *United States v. Imperial Chemical Industries, Ltd.*, (S.D. N.Y. May 16, 1952) pages 10-12.

to use or acquire new inventions and technology, it is clearly proper that the antitrust judgment should require the offenders to make such inventions and technology freely available to others. Compulsory licensing of patents in such a situation is a means of restoring competition to an industry. The courts in private civil cases have evolved a corresponding doctrine with respect to the misuse of patents, that is, that if a patentee has abused the patent grant by attempting to gain control of unpatented materials or otherwise, the courts will not allow the patentee to recover damages for infringement of his patent.[46]

The manner in which antitrust consent judgments are arrived at may not be entirely clear. Such judgments are not drafted by the Government and then forced upon the defendants. In all cases, the defendants, not the Government, initiate the negotiations looking toward a consent judgment. In such discussion, the Government properly insists that a consent judgment must contain the same remedies which would be proper in a litigated judgment. If competition has been improperly eliminated or restrained, the Government considers that full competition should be restored through the medium of the decree. It is both fair and proper, in such situations, that the Government should accept a decree proposed by the defendants if the suggested provisions of the decree are in the public interest and if the relief offered is as extensive and as effective as would be a litigated decree.

Illegal Use of Patents Imperils Free Enterprise

The Department of Justice is fully cognizant of the important contribution which the patent system has made to our industrial economy and has constantly sought to preserve the rights which have been accorded to inventors by the Constitution and by Congress. The opposition of the Government is to the illegal use of patents in such manner as to imperil the free and competitive economic system to which this country is dedicated.

The future of the United States is in large measure dependent upon a constant development of research and technology unfettered by illegal restraints. The misuse of patents must not be permitted to block that driving force in our economy.

During this critical period when we are mobilizing to defend our nation, it is imperative that we do not permit any of the obstacles which frustrated and delayed the war effort in World War II to reappear. One barrier in World War II was the existence of illegal patent restraints and the abuses of the patent right.[47]

It has been said many times that one of the greatest weapons for the defense of the United States is its industrial capacity. In these uncertain days, this capacity is both our nation's shield and sword. If this great production power is to sustain us in the times ahead, then it must remain free of illegal restraints of any kind, including the misuse of the patent grant.

46. *Morton Salt Co. v. G. S. Suppiger*, 314 U.S. 488 (1942).

47. See *Hearings before Committee on Military Affairs on S. 702*, 78th Cong., 1st Sess. (1943-44). Note also statement of Representative Emanuel Celler, Chairman of the House Judiciary Committee, August 10, 1950, with respect to an investigation of certain patent practices as impediments to defense production.

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